No. 8947

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit 7

WILLIAM KING WHITE, ELIZABETH WHITE KING, ROLLIN HENRY WHITE, JR., R. H. WHITE and KATHERINE KING WHITE,

Appellants,

vs.

PENELAS MINING COMPANY (a corporation), Debtor,

Appellee.

APPELLEE'S ANSWERING BRIEF ON THE MERITS AND ON MOTION TO DISMISS.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Page

Appellee's Brief on Motion to Dismiss..... 1

Statement of facts on motion to dismiss appeal..... 2

Argument 4

Time for filing petition to appeal is limited to thirty days after rendition or entry of judgment or order..... 5

The rule invoked is in conformity with the rule in Nevada.. 14

District Court's order of July 13th was merely an elaboration of its order of July 9th..... 20

District Court's oral opinion and order of July 9th is essentially a final order..... 27

The clerk was not required to give notice of the minute entry of the order of July 9th, 1938, all of the parties being present when said order was rendered..... 35

Appellee's Answering Brief on Merits..... 37

Statement of the Pleadings and Jurisdictional Facts..... 37

Statement of the Case..... 37

White-Gordon agreement for acquisition of property and financing operations 37

Corporate organization and financing..... 38

Compromise efforts of Gordon and White prior to petition for relief 39

Debtor's resources and operating record..... 40

White's unwillingness to sell, or to place a price on his interest 50

Appellants' Assignment No. I..... 52

Authoritative corporate action was taken by majority directors 52

White is not immediately entitled to transfer of pledged stock 57

Appellants' Assignment No. II..... 60

Courts will not anticipate inability of debtor to present acceptable plan 60

Page

Section 77B is a remedial statute, and as such is to be liberally construed 61

Statutory exception dispensing with consents of creditors and stockholders 62

Debtor's petition was filed in utmost good faith, for sole purpose of securing justifiable relief from creditors' unreasonable and unreasoning demands..... 70

Appellants are not creditors who will be affected by the reorganization 78

Parol evidence varying terms of written contract..... 79

Court's discretionary power on petition for relief..... 81

Court should consider facts dehors the record under the equitable concepts of Section 77B of the act..... 82

Table of Authorities Cited

Cases

Pages

Amsinck, G., & Co. v. Springfield Grocer Co. (C. C. A. 8th Cir.), 7 Fed. (2d) 855 31

Board of Commerce v. Gorman, 19 Wall. 662, 22 L. Ed. 226 32
Board of Commissioners of Boise County and Ben T. Davis v. John Gorman, 86 U. S. 667, 22 L. Ed. 226 9
Bonner v. Potterf, 47 Fed. (2d) 852 11
Brackett v. Winkle Terra Cotta (8th Cir), 81 Fed. (2d) 949 71
Broders v. Lage, 25 F. (2d) 289 12
Bulkeley, Appeal of, 57 Atl. 112, 76 Conn. 454 19

California State Tel. Co. v. Patterson, 1 Nev. 155 17
Campbell v. Alleghany Corp., 75 Fed. (2d) 947, cer. den. 53 Sup. Ct. 92, 296 U. S. 581, 80 L. Ed. 411 61
Carlisle Lumber Co. v. Hope et al. (C. C. A. 9), 83 Fed. (2d) 92 64
Central Finding Corporation, In re (2 C. C. A.), 75 Fed. (2d) 256 74
Central States Life Ins. Co. v. Koplar Co. (C. C. A. 8), 80 Fed. (2d) 745 65
Central State Life Insce. Co. v. Koplar Co. (C. C. A. 8), 85 Fed. (2d) 181 ..... 79, 82
Central Trust Co. of Calif. v. Holmes Min. Co., 97 Pac. 390, 30 Nev. 437 17
Clements v. Conyers, 31 Fed. (2d) 563 13
Coleman v. Moore & McIntosh, 49 Nev. 139 14
Community Book Co., Inc., In re (D. C. Minn.), 10 Fed. (2d) 616 ..... 56, 57
Continental Ill. National Bank & Trust Co. v. Chicago R. I. & P. Ry. Co., 79 L. Ed. 1110 78
Cory v. Hamilton Nat. Bank (C. C. A. 6th Cir.), 31 Fed. (2d) 379 31
Cosgrave, In re, 10 Fed. Supp. 672 69

Defanti v. Allen Clark Company, 45 Nev. 120, 198 Pac. 549 54
DeMayo v. U. S., 58 Fed. (2d) 231 11
Detroit Trust Co. v. Campbell River Timber Co., 98 Fed. (2d) 389 77

Pages

First National Bank of Wilston v. Conway Road Estates Company (8th Cir.), 94 Fed. (2d) 736 74
Francisco Building Corp., Ltd. v. Battson et al (9th Cir.), 83 Fed. (2d) 93 68
Fulton National Bank of Atlanta v. Gormley (C. C. A. 5), decided Nov. 3rd, 1938, 99 Fed. (2d) 464 26

Georgian Hotel Corporation (C. C. A. 7), 82 Fed. (2d) 917 65
Granville and Winthrop Building Corp., 87 Fed. (2d) 101, cert. den. Keig v. Lloyd, 57 S. Ct. 932, 301 U. S. 702, 81 L. Ed. 1356 65
Grigsby Grunow Co., In re (C. C. A. 7), 77 Fed. (2d) 200.. 77

Henderson Co. v. Wilkins (C. C. A. 4), 43 Fed. (2d) 670.. 82
Hillyer v. Overman Silver Mining Company, 6 Nev. 51.... 54
Hudspeth v. Woods (C. C. A. 8), 70 Fed. (2d) 504..... 10
Hurley Mercantile Co., In re, 56 Fed. (2d) 1023..... 8, 30

Jaqua v. Harkins, 82 N. E. 920, 40 Ind. App. 639..... 18
Johnson v. Johnson (C. C. A. 4), 63 Fed. (2d) 24..... 82

Knickerbocker Hotel Co., In re, 81 Fed. (2d) 98..... 77

Lake's Laundry, In re, 79 Fed. (2d) 236, cert. den. Lake's Laundry v. Braun, 56 S. Ct. 144, 296 U. S. 622, 80 L. Ed. 442 61
Loeb Apts., In re (C. C. A. Ill.), 89 Fed. (2d) 461..... 77
Lone Star Ship Building Company, Bankrupt, 6 Fed. (2d) 912 56

Manati Sugar Co. v. Mack (C. C. A. 2, 1935), 75 Fed. (2d) 284 68
Marine Transit Corp., In re (C. C. A. 2), 79 Fed. (2d) 232 56
McCall, In re, Judge, 145 Fed. 898-9..... 7
Murel Holding Corporation, 75 Fed. (2d) 941..... 67
Mutual Building & Loan Association et al. v. King et ux. (C. C. A. 9, 1934), 83 Fed. (2d) 798, cert. den. Oct. 12, 1936, 57 S. Ct. 27, 299 U. S. 565, 81 L. Ed. 416.....5, 25, 26

National Bank v. Kennedy, 17 Wall. 19, 21 L. Ed. 554..... 80

Ogilvie v. Dexter Horton Estate (C. C. A. 9), 86 Fed. (2d) 282, cert. granted January 11, 1937, 81 L. Ed. 454..... 64
Old Nick Williams Co. v. U. S., 54 L. Ed. 318..... 12

Pages

Oliver v. Garlick (C. C. A. 5th Cir.), 2 Fed. (2d) 132..... 27
Oval Wood Dish Corp., In re, 16 Fed. Supp. 656..... 83

Peck v. Courtis, 31 Cal. 207..... 17
People v. Schmitz, 94 Pac. 407, 7 Cal. App. 330, 15 L. R. A. (N. S.) 717 17
Platt v. Schmitt (C. C. A. 8th Cir., 1937), 87 Fed. (2d) 437 76
Polleys et al. v. Black River Improvement Co., 113 U. S. 81, 28 L. Ed. 938..... 8, 32
Price v. Spokane Silver & Lead Co., 97 Fed. (2d) 237..... 13
Prima Co., In re, 88 Fed. (2d) 785..... 62
Provident Mut. Life Insce. Co. v. University Ev. L. Church (9th Cir. 1937), 90 Fed. (2d) 992..... 76

Reichert, In re (C. C. A. N. Y. 1934), 73 F. (2d) 56, cert. gr. (1934), 55 S. Ct. 215, 293 U. S. 550, 79 L. Ed. 648, aff. (1935), 55 S. Ct. 360, 294 U. S. 116, 70 L. Ed. 796... 9

Schroeder Hotel Co., In re, 86 Fed. (2d) 491..... 61
Security First National Bank v. Rindge Land & Navigation Co. (9th Cir.), 85 Fed. (2d) 557..... 68
Shoreland Co. v. Conklin, 30 Fed. (2d) 489..... 13
Snyder v. Fenner (3 C. C. A.), 101 Fed. (2d) 736..... 77
South Coast Company, In re (D. C. Del., 18 Fed. Supp. 43..71, 77
State ex rel. Ryan v. Murphy, 97 Pac. 391, 30 Nev. 409, 18 L. R. A. (N. S.) 1210..... 17

Tennessee Publishing Company v. American National Bank (C. C. A. 6), 81 Fed. (2d) 463, 81 L. Ed. 13.....75, 83
Texas Hotel Securities Corporation v. Waco Development Company, 87 Fed. (2d) 395..... 66

Union Guardian Trust Co. v. Jastromb (C. C. A. 6th Cir.), 47 Fed. (2d) 689.....23, 25
U. S. v. Bethlehem Steel Co., 205 U. S. 105, 51 L. Ed. 731.. 80
U. S. v. East, 80 Fed. 134..... 12
Utilities Power & Light Corp., In re (C. C. A. Ill. 1937), 91 Fed. (2d) 598..... 60

Vaughan v. American Ins. Co., 15 Fed. (2d) 527..... 12

Wayne United Gas Co. v. Owen-Illinois Glass Co. et al. (4th Cir.), 91 Fed. (2d) 827.....66, 75, 82

Pages
Wellston v. Conway, 94 Fed. (2d) 736 60
Wingert v. President, Directors and Co. of Hagerstown Bank (C. C. A. 4), 41 Fed. (2d) 660 82
Wingert v. Smead, 70 Fed. (2d) 351, cert. den. 55 Sup. Ct. 77 8
Witters, R. L., Associates v. Ebsary Gypsum Co. (C. C. A. 5), 93 Fed. (2d) 746 ..... 61, 71, 72, 73

Yellow Jacket Mining Company v. Stevenson, 5 Nev. 224 .. 54
Youngberg v. Smart, 78 Pac. 422, 70 Kan. 299 18

Codes and Statutes

Bankruptcy Act, Section 24, subsection (c) 5, 12, 34

Nevada Compiled Laws 1929, Pocket Supp., p. 147 59
Nevada Compiled Laws 1929, Section 718 55

Rev. Laws 1127 55

44 Stats. 664 5

11 U. S. C. A., Section 47 5
11 U. S. C. A., Sec. 207, p. 1059 .. 32, 33, 53, 61, 62, 64, 65, 68, 79, 84
28 U. S. C. A., Sections 721-725, p. 42 35

Rules and Texts

Admiralty Rule 6 84
12 Amer. Jur., Section 232, p. 756 80

1 Black, Judg., Section 179 18

Carmichael Bankruptcy Handbook, p. 160 64
14a C. J. 89, Section 1846, notes 25-28 53
49 C. J. 1021 58
8 C. J. S. 1783, Section 832 56

Equity Rule 3 ..... 35, 36
Equity Rule 4 ..... 35, 36

1 Gerdes on Corporate Reorganizations, Section 112, p. 267 54
1 Gerdes on Corporate Reorganizations, Section 232, p. 499, Section 232, pp. 502-503 77

Pages

2 Gerdes on Corporate Reorganizations, Section 1086, pp. 1741-1742 64

Johnson on Bankruptcy Reorganization, Section 260, p. 237 56

McKeown on Federal Debtor Relief Laws, p. 26..... 63
McKeown on Federal Debtor Relief Laws, pp. 138-139.... 63

7 Remington, 1938 Supp. 162, 163..... 77
7 Remington, 1938 Supp., p. 183..... 79
7 Remington, 1938 Supp., p. 258..... 83
7 Remington, 1938 Supp., p. 288..... 64
Rules of Civil Procedure, Rule 79..... 36
Rules of Civil Procedure, Rule 86..... 36

Stearns on Suretyship, 3rd Ed., Section 6, pp. 5-6..... 58
Stearns on Suretyship, 3rd Ed., Section 61, p. 73..... 59

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Appellants,

vs.

PENELAS MINING COMPANY (a corporation), Debtor,

Appellee.

APPELLEE'S BRIEF ON MOTION TO DISMISS.

Although as proponent of the Motion to Dismiss appellee has the right to open and close on the motion, appellants have included as the second section of their opening brief on the merits what is in fact their answering brief on the Motion to Dismiss.

It would seem that the Motion to Dismiss should be determined before taking up the appeal on the merits, particularly as the motion was brought before the record on appeal was filed, was thereafter submitted on typewritten briefs without argument on January 23rd, 1939, and subsequently by Court Order of January 30th, 1939 was continued for determination at the time of hearing on the merits.

While appellee has the right to open and close on the motion, and under customary procedure would thus be permitted to serve and file a closing brief thereon after appellants filed their answering brief on the motion, inasmuch as appellants have seen fit to open on the motion conjunctively with their Opening Brief on the merits we recognize the propriety of likewise incorporating our brief on the motion with brief on the merits, but assume that we shall have the right to serve and file a closing brief on the motion in the event that appellants further brief that particular question in their Reply Brief on the merits.

STATEMENT OF FACTS ON MOTION TO DISMISS APPEAL.

Proceedings in the Court below were had on appellants' Petition for Orders setting aside the approval of Debtor's Petition for Relief, and that if said Petition be permitted to stand that an independent trustee be appointed, and were heard by the trial court on June 29th and 30th, July 1st, 2nd, 6th, 7th, 8th and 9th, 1938.

At the conclusion of the argument on Saturday, July 9th, 1938, the matter was submitted and the Court thereupon, on said day, rendered its oral opinion and decision approving the Debtor's Petition. (R. 37-42.)

The Clerk thereupon made the following entry in the Minutes of the Court, as of Saturday, July 9th, 1938 (R. 42):

"In the District Court of the United States,
in and for the District of Nevada.
No. A-30-A.

In the Matter of
Penelas Mining Company
(a corporation),
Debtor.

Minutes of Court
of
Saturday, July 9, 1938.

The further hearing herein coming on regularly this day, the same counsel, parties and reporter being present. Mr. Rowson resumes closing argument, following which the matter is submitted, subject to the right of debtor to file points and authorities or brief. At 11:40 o'clock A. M. a recess is declared and counsel and the Court discuss the matter of appointment of trustees if the Court should determine that trustees be appointed. Case reconvened. THE COURT: 'ORDERED debtor's petition sustained and granted, but under the conditions that the property be placed in the hands of a board of three trustees, those trustees will be Messrs. R. H. White, L. D. Gordon, and E. J. Schrader. The Petition is approved and the matter referred to the three trustees now'. Mr. Higgins requests the Court to substitute Mr. George B. Thatcher for Mr. White as a trustee. Mr. Rowson replies and states he has no objection to this change if Mr. Gordon be allowed to remain as operating trustee. Thereupon, IT IS ORDERED that Geo. B. Thatcher be, and he hereby is, appointed as trustee in lieu of R. H. White."

The Court did not at any time instruct appellee to prepare Findings or to prepare a formal Judgment or Order, but on July 13th, 1938 appellants presented to the trial court, ex parte and without service upon or notice to appellee or its counsel, a form of Order which was thereupon on said last mentioned date signed by the court and filed. (R. 43-49.)

Appellee was not furnished with copy of said ex parte Order, had no notice of the purported entry and received no copy thereof until July 26th, 1938.

Appellants' Petition for Leave to Appeal was filed in the above entitled Court on the 9th day of August, 1938, and Order Allowing Appeal and Citation on Appeal thereupon issued on the 15th day of August, 1938. No service of appellants' Petition to Appeal, Assignment of Errors or Brief in support of Petition for Allowance of Appeal was attempted to be made upon appellee until August 12th, 1938, and no copies of said several papers were furnished to appellee, until the 17th day of August, 1938, at which time appellee declined to admit service, no opportunity having been afforded appellee to oppose the granting of said Petition for Appeal prior to its allowance as aforesaid.

ARGUMENT.

On the foregoing facts it is the contention of appellee that the appeal in these proceedings was improvidently allowed, in that the time for filing said Petition for Appeal expired thirty days from and

after the date of rendition of the trial court's Decision and Order and the entry thereof upon the Minutes of the Court, and on, to-wit, the 8th day *of* August, 1938; that this Honorable Court is without jurisdiction to consider said appeal, and that the same should be dismissed.

TIME FOR FILING PETITION TO APPEAL IS LIMITED TO THIRTY DAYS AFTER RENDITION OR ENTRY OF JUDGMENT OR ORDER.

Sub-section (c) of Sec. 24 of the Bankruptcy Act, as amended by the Act of May 29th, 1926 (44 Stats. 664; U. S. C. A. Title 11, Sec. 47) reads as follows: lows:

> "All appeals under this section shall be taken within thirty days after the judgment, or order, or other matter complained of, has been rendered or entered."

It is to be noted that the language of this section is in the disjunctive as to the words "rendered or entered". Either the rendition *or* entry of a judgment or order tolls the time for filing. However, in the matter at bar the trial court's order of July 9th, 1938 was both rendered *and* entered, the Clerk having forthwith entered the Order on the court's Minutes on that day.

That a subsequent entry of a formal judgment cannot avail to extend the time on appeal was established in *Mutual Building & Loan Association et al. v. King et ux.* (C. C. A. 9, 1934, 83 Fed. (2d) 798,

cer. den. Oct. 12, 1936, 57 S. Ct. 27, 299 U. S. 565, 81 L. Ed. 416), in which this Honorable Court held:

> "Minute order disallowing exceptions to special master's report recommending refusal of adjudication of bankruptcy and dismissing petitions in involuntary bankruptcy held appealable 'final order' refusing adjudication of bankruptcy, right to appeal from which could not be extended by subsequent entry of formal judgment to same effect. (Bankr. Act., Sec. 25, 11 U. S. C. A., Sec. 48.)"

In that case it was said (at pp. 799-800):

> "'The two cases were tried together, and on July 13, 1934, the special master reported his conclusions and recommended that adjudication of bankruptcy be refused on the ground that only two creditors had qualified as such against the respective bankrupts. On October 25, 1934, after hearing, the court sustained the report of the special master and made a minute order disallowing the exceptions and approving the report and dismissing the petitions. This was followed by a formal judgment to the same effect on December 24, 1934."
>
> "At the time of the argument it was conceded by the appellee that the minute order of October 25, 1934, was not an appealable order because the parties thereafter appeared and agreed to a form of dismissal which was approved, signed, and filed by the trial judge on December 24, 1934. By permission briefs were filed subsequent to the argument, and the appellee now contends that the minute order of October 25, 1934, was a final order refusing to adjudicate bankruptcy,

> appealable as such, and that time for appeal could not be extended by the entry of the subsequent order to the same effect. Both these propositions are thoroughly established. The minute order is as follows: * * *"
>
> "The right to appeal could not be revived by subsequent entry of the same order. Hudspeth v. Woods, supra, Bonner v. Potterf (C. C. A.), 47 F. (2d) 852. It follows that the denial of the adjudication of bankruptcy had become final before any of the proceedings of which the appellant complains. The appeals were allowed both by this court and the District Court, and therefore are properly before us. The appeals from the order of December 24, 1934, however, are ineffectual for any purpose because the adjudication had become final before that order was entered."
>
> "The appeal from the order of adjudication of bankruptcy contained in the decree of December 24, 1934, is too late and must be dismissed for that reason."

The rule here invoked has been followed in numerous decisions holding that entry of a subsequent formal order does not operate to extend the time for appeal. Those now cited represent only a few of the available authorities:

> "The time limit, for review of an order confirming a bankrupt's composition by appeal, begins to run from the entry of the confirmation order on the records of the court, as provided by Rev. St., Sec. 1008. (U. S. Comp. St. 1901, p. 715.)"
>
> (*In re McCall,* Judge, 145 Fed. 898-9.)

"Circuit Court of Appeals has no discretion to entertain appeal in bankruptcy case which is not perfected according to the applicable statute—Bankruptcy Act, Sec. 24b, as amended 11 U. S. C. A. 47b."

(*Wingert v. Smead,* 70 Fed. (2d) 351; cer. den. 55 Sup. Ct. 77.)

In the case last cited it was held that the Circuit Court was without jurisdiction to allow the appeal, as the application for leave to appeal was filed too late, and not within thirty days from time the District Court ruling was rendered.

"Strictly speaking, judgment is 'rendered' when finally published by judge orally or in writing according to court's practice."

(*In re Hurley Mercantile Co.,* 56 F. (2d) 1023.)

"Strictly speaking, judgment is 'entered' when spread by clerk on record, or noted and filed among papers of court according to its practice."

(Idem.)

"It is the record of the judicial decision or order of the court found in the record book of the court's proceedings which constitutes the evidence of the judgment, and from the date of its entry in that book the Statute of Limitation begins to run. It follows that the writ of error in this case was brought five days after the two years allowed by law had expired; and it must be dismissed. So ordered."

(*Polleys et al. v. Black River Improvement Co.,* 113 U. S. 81, 28 L. Ed. 938.)

"Order directing clerk to enter forthwith the discharge of bankrupt held appealable as 'final order', though clerk had not yet made formal entry of the order at time of appeal."

(*In re Reichert* (C. C. A. N. Y. 1934), 73 F. (2d) 56, cert. gr. (1934), 55 S. Ct. 215, 293 U. S. 550, 79 L. Ed. 648, aff. (1935), 55 S. Ct. 360, 294 U. S. 116, 70 L. Ed. 796.)

"It is claimed, however, that as the record of the judgment was not signed by the judge of the court until the 21st, the ten days did not commence to run until that date, and we are referred to the case of Silsby v. Foote, 20 How. 290 (61 U. S., XV., 822), as establishing such a rule. In that case the decision was actually rendered on the 28th of August, but the decree was special in its terms, and was not settled or signed by the judge until the 11th of December. Before any entry could be made it was necessary that the judge should pass upon its form. It was, therefore, quite right to delay the appeal until the exact character of the decree could be shown. Here, however, the form of the judgment was settled upon the announcement of the decision, and it was entered accordingly."

(*The Board of Commissioners of Boise County, and Ben T. Davis v. John Gorman,* 86 U. S. 667, 22 L. Ed. 226.)

"Order Denominated Order Denying Petition for Review and affirming Order of Referee and stating that Court denied petition for review and affirmed Order was 'final decree' denying home-

> stead to bankrupt's wife, so that subsequent formal Order did not extend time for appeal." (*Hudspeth v. Woods,* C. C. A. 8, 70 Fed. (2d) 504.)

The case last cited was before the Court on appellee's Motion to Dismiss the appeal from a District Court Order reviewing a Referee's Order. On August 29th, 1932, the District Court entered a short Order affirming the Referee's Order and granting appellant an exception. Subsequently, on March 29th, 1933, the District Court made and entered a "Final Decree Affirming Referee's Order and denying Petition for Review", which was merely an elaboration of the precedent Order of August 29th, 1932. An appeal was taken from the Order of March 29th, 1933, on April 25th, 1933.

On this state of the record appellee successfully contended that the initial Order of August 29th, 1932, was a final decree, and that the entry of the second Order of March 29th, 1933, could not be made to extend the time allowed for appeal.

In sustaining appellee's position on Motion to Dismiss the appeal, the Circuit Court said (at p. 505):

> "It is true that the second Order is more formal and more specific, but had the second Order never have been made, there would have been no question of the matter having been fully disposed of. The situation is ruled by DeMayo v. U. S., 58 Fed. (2d) 231, this Court."

In the last mentioned case (*DeMayo v. U. S.*), at p. 231, the Court said:

"While the record is silent as to why this second Order was entered it is obvious that it must have been done at the instance of appellant. It is this same Order, 'filed' as was the earlier Order, from which this appeal is brought. Clearly, the earlier Order definitely and finally determined the rights of appellant under his application. Obviously, the court and counsel for both parties regarded and treated this as an Order. The earlier Order was a final Order and made part of the record in the case. It was appealable.

As the term within which that Order was entered had expired, the court had no jurisdiction to make the subsequent Order. Lacking that power, the Order is a nullity leaving the earlier Order in all respects unaffected. Being a nullity this subsequent Order could afford no basis for an appeal. Therefore, this appeal was improvidently allowed, and it should be, and is, dismissed."

"Re-entering order denying claim against bankrupt's estate Held ineffective to enlarge time for appeal, where no motion for reopening original order was made within 30 days."

(*Bonner v. Potterf,* 47 Fed. (2d) 852.)

"Re-entry of original order denying claim against bankrupt's estate, where made to save right of appeal, is beyond trial court's sound discretion."

(Idem.)

"U. S. held not entitled to appeal from judgment dissolving claim for taxes against bankrupt's estate where appeal was not filed within 30 days

after judgment, notwithstanding entry of new judgment after expiration of period upon rehearing to enable U. S. to perfect appeal * * *"

(*U. S. v. East,* 80 Fed. 134.)

To the same effect, holding that proceedings by which it is attempted to extend time of appeal are ineffectual to that end, see numerous cases cited at page 135, 1st column in the last case cited.

"The time for applying for appeal cannot be extended either by agreement of the parties nor by the court."

(*Old Nick Williams Co. v. U. S.,* 54 L. Ed. 318.)

Subsection (c) of Section 24, Bankruptcy Act is specific in its terms, clearly applicable here, and cannot be ignored. Under that section, and the many authorities cited, the court lacks jurisdiction to consider this appeal on the merits.

"A statute limiting the time within which an appeal may be prosecuted is mandatory and jurisdictional."

(*Broders v. Lage,* 25 F. (2d) 289.)

"Extended discussion of the law is unnecessary, as it is well settled that statutes limiting the time in which appeals and writs of error may be brought are mandatory and jurisdictional. The statute begins to run from the date of the judgment, and the time cannot be extended by waiver, by agreement of the parties, nor by order of the court."

(*Vaughan v. American Ins. Co.,* 15 Fed. (2d) 527.)

"An order in bankruptcy, * * * is reviewable solely by order allowed by appellate court under Bankruptcy Act, Sec. 24b, as amended by Act May 27, 1926, Sec. 9 (11 U. S. C. A., Sec. 47(b)), and the 30 days within which to apply for such order having passed, appellate court was wholly without jurisdiction to consider appeal allowable by District Court."

(*Shoreland Co. v. Conklin,* 30 Fed. (2d) 489-490.)

"The appellant was by the statute allowed 30 days within which to apply for such an order, and, that time having long since passed, this court is wholly without jurisdiction to consider the matter complained of by the Penney-Gwinn corporation, and hence its appeal will be dismissed."

(Idem, at p. 491.)

"Failure to prosecute appeal in bankruptcy proceedings in 30 days, or failure to secure allowance of appeal by appellate court in certain proceedings defined in Bankruptcy Act, Sec. 24b, as amended by Act May 27, 1926, Sec. 9 (11 U. S. C. A., Sec. 47), is fatal to the appeal."

(*Clements v. Conyers,* 31 Fed. (2d) 563.)

"It is our opinion that an appeal is 'taken' within the meaning of Section 24c when a proper petition therefor is filed within 30 days from the date of the entry of the order."

(*Price v. Spokane Silver & Lead Co.,* 97 Fed. (2d) 237, at p. 239.)

THE RULE INVOKED IS IN CONFORMITY WITH THE RULE IN NEVADA.

Under the rule of conformity it is fitting to consider pronouncements of the Nevada Supreme Court on the question at bar.

> "The announcement by the court on a certain date of its decision, entered in the minutes of the court, constituted the 'rendition of a judgment', within Rev. Laws, sec. 5329, notwithstanding there was no judgment signed at that time, and, upon the death of the judge entering the decision, the succeeding judge later signed the judgment pursuant to amendment to practice act, sec. 547, found in Stats. 1925, c. 77."
>
> (*Coleman v. Moore & McIntosh,* 49 Nev. 139.)

> "Judgment became effective from time it was rendered and time for all later proceedings began to run from that date, February 6, 1925. On September 14, 1925, another judge signed and had filed written judgment, dating it February 6, 1925. We contend time began to run from earlier date. If correct, motion should be granted. Tel. Co. v. Patterson, 1 Nev. 150; Nelson v. Smith, 42 Nev. 302; Clark v. Turner, 42 Nev. 450."
>
> (Idem, at p. 140.)

> "As we have stated, the appeal in this case is from the judgment only. An appeal may be taken from a final judgment within six months after the rendition of judgment. Section 5329, Rev. Laws. If judgment was rendered on the 6th day of February, 1925, the appeal must be dismissed, for it was not taken until nearly eight months thereafter, on the 30th day of September, 1925.

Plaintiffs assert that the former appeal was premature and taken merely as a precautionary measure, and contend that their time within which to take an appeal did not begin to run until the formal judgment was signed and entered on the 14th day of September, 1925. The contention cannot be sustained. The announcement of the court on the 6th day of February, 1925, of its decision, which was entered in the minutes of the court, was the rendition of final judgment. The same contention was made in Central T. Co. v. Holmes M. Co., 30 Nev. 437, 97 P. 390, in respect to which the court said:

'It is contended by counsel for appellants that the statutes of limitations in respect to the filing of an appeal do not begin to run until the entry of the judgment. In this contention we disagree with counsel. In some jurisdictions, notably in California, pursuant to the provisions of statute, the time for taking an appeal does not begin to run until the entry of the judgment, and if an appeal be taken before such entry it will be dismissed as being premature. An examination of the decisions in such jurisdictions will readily show that the statutes regulating appeals have always been rigidly followed; and upon a parity of reasoning this court in a repeated line of decisions has followed the sections of the Compiled Laws defining the procedure to be taken on appeal. Where the statute refers to the rendition of judgment, it means the formal announcement by the court, and does not mean the entry of the same by the clerk.'

It is true that in the foregoing case a written decision was filed at the time judgment was

ordered, but in the course of its opinion the court said:

'It is evident therefore, that when the district court on the 7th day of June, 1906, made its oral decision and ordered that judgment be entered accordingly, that act constituted the rendition of judgment referred to in the statutes, regulating the time from which appellants' right to appeal began to run; and, as it appears that appellants did not avail themselves of their right of appeal within the time allowed by law, this court has no jurisdiction to proceed to determine the merits of this appeal.'

Decisions of this court to the same effect are cited and reviewed in the opinion.

In Cal. State Tel. Co. v. Patterson, 1 Nev. 155, the court said:

'The judgment is a judicial act of the court, the entry is the ministerial act of the clerk. The judgment is as final when pronounced by the court as when it is entered and recorded by the clerk, as required by statute.'

'The right of appeal under our practice does not depend upon the entry or perfection of the judgment of the lower court, but upon the rendition of it.' Id.

'An appeal taken more than six months after the rendition of judgment will be dismissed.' Nelson v. Smith, 42 Nev. 302, 176 P. 261, 178 P. 625; Clark v. Turner, 42 Nev. 450, 180 P. 908.''

(Idem, at pp. 142-3-4.)

''Where a statute refers to the rendition of judgment, it means the formal announcement by the

court and does not mean the entry of the same by the clerk. The judgment is a judicial act of the court. The entry is a ministerial act of the clerk. The judgment is as final when pronounced by the court as when it is entered and recorded by the clerk as required by statute."

(*State ex rel. Ryan v. Murphy,* 97 Pac. 391, 30 Nev. 409, 18 L. R. A. (N.S.) 1210 (quoting *California State Tel. Co. v. Patterson,* 1 Nev. 155.)

" 'Where the statute refers to the "rendition of judgment", it means the formal announcement by the court and does not mean the entry of the same by the clerk.' Hence under Comp. Laws, Secs. 3425, 3426, providing that an appeal may be taken from a final judgment within one year 'after the rendition' thereof, etc., the time within which an appeal must be taken begins to run from the date the court made its decision and ordered judgment to be entered accordingly though the judgment was not entered until later."

(*Central Trust Co. of Calif. v. Holmes Min. Co.,* 97 Pac. 390, 391, 30 Nev. 437.)

The view adopted in Nevada is in consonance with the decisions in many other States.

" 'The "rendition" and "entry" of a judgment are entirely different acts—one is to be performed by the court and must be in order of time, and the other by the clerk.' "

(*People v. Schmitz,* 94 Pac. 407, 410, 7 Cal. App. 330, 15 L. R. A. (N.S.) 717 (quoting from *Peck v. Courtis,* 31 Cal. 207.)

"'The "rendition of a judgment" * * * is an entirely different thing from the entry of it. The former is the act of the law through the mouth of the judge; the latter the act of the clerk. The former gives force and efficacy to the judgment; the latter preserves a memorial of it. The former is a judicial act; the latter a ministerial act.'"

(*Jaqua v. Harkins,* 82 N. E. 920, 40 Ind. App. 639 (quoting and adopting the definition in 1 *Black, Judg.,* Sec. 179).)

"A judgment of conviction pronounced by the court constitutes the 'rendition of a judgment', within the meaning and requirements of Chapter 389, p. 594, Laws 1905, allowing 90 days after the rendition of a judgment in which to file a record in the Supreme Court on appeal from the conviction of a misdemeanor, to entitle defendant to a stay of execution pending the appeal."

(*Youngberg v. Smart,* 78 Pac. 422, 423, 70 Kan. 299.)

"'A judgment is rendered whenever the trial judge officially announces his decision in open court, or out of court signifies to the clerk, in his official capacity and for his official guidance —whether orally or by written memorandum— the sentence of the law pronounced by him in any cause. This pronouncement of the court it is incumbent upon the clerk to forthwith enter. The writing out of the judgment in the form of a judgment file, to be recorded is a matter of subsequent clerical action. There is recognized a clear distinction not only between the judgment

> and the writing which is required to be made to evidence it, but also between the "rendition" of the judgment and the preparation of this writing at some subsequent time. In Goldreyer v. Cronan, 55 Atl. 594, 76 Conn. 113, this distinction is judicially asserted. It is there said that the filed memorandum of decision brought a judgment into existence; that a judgment, speaking generally, is the determination or sentence of the law, speaking through the court, and does not exist as a legal entity until pronounced, expressed, or made known in some appropriate way; that it may be expressed orally or in writing, or in both of these ways, in accordance with the customs and usages of the court in which it is rendered.' "
>
> (*Appeal of Bulkeley,* 57 Atl. 112, 113, 76 Conn. 454.)

It is significant that notwithstanding counsel for appellants are familiar with the Nevada rule, and of appellee's invocation of that rule in its typewritten Memo of Authorities heretofore filed in support of this Motion, they have not seen fit to question its efficacy and application to the matter at bar, under the rule of conformity.

Search of the authorities has disclosed no parallel case in which the time for appeal has been computed from the date of filing a formal judgment or order, where rendition of the Court's decision was evidenced by the Clerk's minute entry of the judgment or order so rendered.

The Clerk was required to enter the Order of July 9th without any direction by the District Judge. (Eq. Rule 3.)

If any material change was intended to be made by the Order of July 13th, 1938, or if the Order of July 9th was to be vacated, the Debtor was entitled to be notified in advance of the entry of any new or amendatory order, and afforded an opportunity to be heard.

DISTRICT COURT'S ORDER OF JULY 13TH WAS MERELY AN ELABORATION OF ITS ORDER OF JULY 9TH.

Appellants have enumerated and paraphrased the provisions of the so-called formal order. (Op. Br. pp. 48-49.)

For the purpose of showing duplication we will again enumerate and add our comment seriatim:

1. That Interveners' prayer for dismissal of the Petition be denied.

This is mere repetition of the action taken on July 9th, 1938. When Debtor's Petition for Relief was sustained by the trial court, denial of Interveners' objections followed automatically. The sustaining of the Petition disposed of the objections.

2. That L. D. Gordon, George B. Thatcher and E. J. Schrader be appointed Trustees of the Debtor's Estate, and describing the properties which are to be subject to the trusteeship.

The same trustees were named in the opinion and order rendered and entered on July 9th, 1938. The

property placed in their charge was not only fully known to them, having been before the court in their presence during a protracted hearing, but is fully described in Debtor's Petition for Relief.

3. Authorizing the Trustees to take possession of the assets of the Debtor and prescribing their powers.

On July 9th, 1938, the Court ordered that the property "be placed in the hands of the Trustees". That order is plenary and all-sufficient to vest possession of all of the Debtor's estate.

4. Further enumerating powers of the Trustees.

Powers of the Trustees are prescribed by the Act itself and require no enumeration where the trial court has placed the property in the hands of the Trustees, without any restrictions.

5. Ordering the Debtor to deliver its properties to the Trustees.

This again is mere repetition of the prior order placing the property in the hands of the Trustees. When the Court so ordered the Trustees placed in possession, it was incumbent upon the Debtor to surrender possession without further order.

6. Providing for the closing of the books of the Debtor as of July 15th, 1938, and opening new books of account by the Trustees on July 16th, 1938.

This is nothing more than a matter of clerical accounting to be performed in the ordinary course of bookkeeping. It is entirely within the customary powers of the Trustees to determine when the Debtor's books should be closed and the Trustees' books opened,

dependent upon the order of their appointment and the date best suited to the drawing of a line of demarcation as between the suspension of the Debtor's operation of its property and the inception of the Trustees' management.

7. Authorizing the Trustees to hold possession of the property until further order of the court.

It necessarily follows that the Trustees hold office subject to the further order of the court, who may terminate their appointment and possession of the property at any time. This matter also is fully covered by the Act itself.

8. Authorizing the Trustees to apply for instructions as to their duties.

It is elementary that Trustees may apply to the court for instructions without any precedent authorization from the court.

9. Ordering the Trustees to file schedules of the assets turned over to them and to file reports.

This is also covered by the Act itself and requires no order.

10. Providing the Trustees shall qualify upon executing a $5000.00 bond each.

The Act does not require that the Trustees' bond be fixed immediately. Hence the fixing of the bond is not an essential element of the court's order sustaining the Petition for Relief, but is a matter which may be and quite generally is covered by a subsequent and separate order.

Appellants take two inconsistent positions: That the opinion of July 9th, 1938 was not an order; and that the order of July 13th, 1938 was an order either vacating or modifying, amending or enlarging the previous order. Of course, there could be no vacation, amendment, modification or enlargement of something which did not exist. Unless the trial court's action of July 9th, 1938 is recognized as an order—and of that we contend there can be no doubt in light of the phraseology used by the court—there was nothing to vacate, modify, amend or enlarge when appellants presented their so-called formal order on July 13th, 1938.

Union Guardian Trust Co. v. Jastromb (C. C. A. 6th Cir., 47 Fed. (2d) 689) is cited by counsel (Op. Br. pp. 51-53) as presenting a similar situation.

In that case the trial court's opinion of March 7th, 1930 presaged that something further was to be done in these significant words: "And orders may be entered in accordance with this memorandum."

The opinion had none of the attributes of a final order in any event.

The formal order which was subsequently drafted and presented by counsel for the Appellants there, although in substantially the same language as the court's earlier opinion, was signed by the Judge on March 18th, 1930 "after some controversy and revision," from which it may be reasonably inferred that neither the court nor the parties were at first entirely clear as to what the opinion of March 7th, 1930 actually portended.

In the case at bar there was no controversy or misunderstanding of any kind as to the meaning and effect of the trial court's order of July 9th, 1938, and as we pointed out in our Opening Memorandum the trial court did not instruct counsel to prepare a formal order. If any further order was necessary to carry the court's judgment into effect, counsel for the prevailing party, the Debtor, was the one upon whom the duty of preparing it would properly have devolved. On the contrary, the so-called formal order was prepared by counsel for appellants, ex gratia for themselves, of their own volition, and was thereupon presented ex parte to the court on July 13th, 1938, with no notice to counsel for appellee until July 26th, 1938, thirteen days after the so-called order had been signed. The Debtor was afforded no opportunity to be heard as to the propriety, efficacy, scope, general purport or necessity, if any, of the proposed Order. Certainly as the prevailing party the Debtor was entitled to be timely apprised of any contemplated order affecting its rights in the premises—especially if, as appellants now contend, such subsequent order was to modify or amend, or supersede the previous order in any material particular.

In the above cited case noted by counsel it appears that notwithstanding the Appellate Court's holding that the formal order of March 18th superseded and in effect vacated the earlier order, it also held that the prior order of March 7th, 1930 was a valid order from which an appeal could have been taken.

Appellants here fall far short of the mark in their efforts to minimize the effect of this Honorable Court's decision in *Mutual Building & Loan Association v. King et ux.* (C. C. A. 9, 83 Fed. (2d) 798), and in their attempt to distinguish that authority from the ruling in *Union Trust Co. v. Jastromb,* supra. (Op. Br. p. 53.)

We have stressed the case of *Mutual Building & Loan Association v. King,* and as we consider the only points made by appellants in their brief discussion of that presumptively controlling authority, we are all the more convinced of its applicability.

Our opponents contend that in the case last mentioned "the right to appeal had been lost by the lapse of time before the subsequent order or judgment had been made or entered," and that the court's control over its previous order had lapsed and could not be revived by the subsequent entry of the same order.

We submit that such were not the bases of this Honorable Court's ruling dismissing the appeal as brought out of time. The chronology in that case is quite simple:

The trial court's minute order sustaining the report of the special master was made on October 25th, 1934; and was followed by a formal judgment on December 24th, 1934, in the same term.

On oral argument appellees at first conceded that the minute order of October 25th, 1934 was not an appealable order "because the parties thereafter appeared and agreed to a form of dismissal which was approved,

signed and filed by the Trial Judge on December 24th, 1934."

However, post argument briefs were filed by permission and it developed that the appellees had changed front and for the first time contended that the Minute Order of October 25th, 1934 was in fact an appealable final order, and that the time for appeal could not be extended by entry of the subsequent formal order.

On that state of the record this court held that both of appellees' said propositions are thoroughly established, and dismissed the appeal.

We have an abiding conviction that in the case at bar appellee is in much stronger position to invoke the rule which was recognized by this court in *Mutual Building & Loan Association v. King,* than were the appellees in that case when they finally resorted to a motion for dismissal of the appeal.

In the recent case of *Fulton National Bank of Atlanta v. Gormley* (C. C. A. 5, decided Nov. 3rd, 1938, 99 Fed. (2d) 464), it was unsuccessfully urged as a ground for appeal that the order appealed from was a reaffirmation of a previous order from which no appeal was taken. However, it is to be noted in that case the court points out that the initial judgment was not in fact final, but gave the appellant leave to make a showing to reduce it, and hence the judgment appealed from was a new judgment and constituted a new foundation for appeal. We cite this case for the purpose of illustrating our point that unless the judgment subsequently rendered or entered differs from

the initial judgment rendered or entered, the time for appeal begins to toll from the date of entry or rendition of the initial judgment.

DISTRICT COURT'S ORAL OPINION AND ORDER OF JULY 9TH IS ESSENTIALLY A FINAL ORDER.

In its oral opinion and order the trial court used words of finality throughout, as distinguished from a mere preliminary statement indicating that it was the court's intention to make any further order in the matter.

The court's subsequent pro forma compliance with appellants' ex parte request for the signing of a formal order does not minimize the effect of its order of July 9th.

Oliver v. Garlick (C. C. A. 5th Cir., 2 Fed. (2d) 132) is cited by appellants (Op. Br. p. 54), but furnishes no support for appellants' position here.

The text of the opinion *filed* by the court in that case is not reported, so there is no basis for comparison between that opinion and the opinion and order *rendered* and *entered* in the case at bar. It does not appear whether the opinion in that case contained any of the adjuncts of an order, but inasmuch as there is no mention of any minute entry having been made by the Clerk, or in fact of any *entry* at all either prior or subsequent to the *filing* of the opinion, we may reasonably assume that the latter had none of the characteristics of an order.

Whether the court of last resort in Georgia has passed upon the finality of an opinion as being the final judgment or order from which an appeal should be taken, as has been done in Nevada, is not shown in the reported decision.

Regardless of the absence of essential facts which may have been considered by the Appellate Court in the case under discussion, it is readily to be distinguished by the Appellate Court's statement of its reasons for denying the motion to dismiss the appeal. After stating that the trial judge treated the writing of September 28th as an opinion, and thereafter granted final judgment, the Appellate Court continues:

> "And as we are affirming said judgment we accept the judge's construction of said writing of September 28th * * *"

Clearly the Appellate Court deemed it unnecessary to deliberate on the motion to dismiss the appeal, because the appeal itself was to be decided adversely to the appellants, and the trial court's judgment in favor of the movants affirmed.

The trial court's use of the words "I will" in sustaining the Petition is equivalent to "I do" sustain the Petition. As used by the court the words "I will" are not words of futurity but of present action and determination. The same also applies to the appointment of the three Trustees, in which the trial court stated that the Trustees "will be" Mr. White, Mr. Gordon and Mr. Schrader.

The colloquy mentioned by counsel (Op. Br. p. 56) was occasioned by the declination of Mr. White to

serve as a Trustee, and culminated in a general request to the court by all parties present that Mr. Thatcher be appointed in Mr. White's stead. Hence the court's statement "if that is the desire," followed by the words "I appoint Mr. Thatcher," having been made responsive to such general request, may only be construed as a present and effective appointment, and not one requiring further action or order in the future.

In its oral opinion the trial court said, inter alia:

> "I will sustain the Petition and grant the Petition, but under the conditions that the property be placed in the hands of a Board of three Trustees. These Trustees will be Mr. White, Mr. Gordon and Mr. Schrader * * *"
>
> (Op. Br. p. 46.)

The court then stated:

> "I am not, at this time, going to put any restrictions on the Board of Trustees. I will leave it to them to get together for the purpose of carrying out the real purpose of the corporation."
>
> (Op. Br. p. 46.)

In concluding its oral opinion, the court said:

> "With best wishes and success of the administration, that will be the order of the court at this time. The Petition is approved and the matter is referred to the three Trustees named."
>
> (Op. Br. p. 47.)

The court's use of the words "That will be the order of the court" leaves no question as to the finality of the court's intentions.

As supporting appellants' premise that the trial court did not completely dispose of the issues so as to render its opinion an appealable order, appellants cite three cases which we will briefly discuss in the order in which they appear in the Opening Brief. (pp. 57-61.)

In re Hurley Mercantile Co. (56 Fed. (2d) 1023):

This case has been cited supra for the construction given to the words "rendered" and "entered". Although counsel has quoted from the decision at length, the meager facts presented there are so dissimilar from those in the instant case that they have little in common on the supposedly basic question invoked by counsel.

The reported decision furnishes no information as to the contents of the trial court's order further than to say that the order recites a hearing had on October 24th, 1931, that the order is not otherwise dated, and that it was endorsed by the Clerk as filed November 6th, 1931.

Whether the trial court had the matter under advisement in the interim, or why the judgment was not sooner filed does not appear.

In that situation, and inasmuch as there was neither filing nor entry of the order until November 26th, 1931 the Appellate Court necessarily said (at p. 1025): "No transcript can be obtained of an unfiled written judgment", although having well in mind that the statutory language fixing time for appeal is important.

G. Amsinck & Co. v. Springfield Grocer Co. (C. C. A. 8th Cir., 7 Fed. (2d) 855):

This case is clearly not in point. The memorandum filed by the District Judge on July 2, 1923 was followed in the same term by a motion to reopen the case, and in granting that motion the trial court said (at p. 858):

> "This case was heard at a previous term of this court, and a memorandum opinion filed, ruling upon the merits as then presented. This memorandum failing to be brought to the attention of counsel, no judgment was entered therein, and the case stands as though under advisement."

It also appears on the same page:

> "Nor did the parties consider the memorandum as a judgment."

And furthermore, that the parties had stipulated:

> "That before a judgment is rendered the judge will make a written finding of fact, etc." (p. 858.)

Cory v. Hamilton Nat. Bank (C. C. A. 6th Cir., 31 Fed. (2d) 379):

The opinion in that case was *rendered* on August 29, 1927, but there does not appear to have been any *entry* made thereon, either by the Clerk or at all, until entry of the order of September 17, 1927.

The decision as reported recites only one paragraph of the opinion, and furnishes but scant information as to what facts were before the Appellate Court on the suggestion to dismiss. Such facts as do appear are not parallel with the case at bar as the lack of entry

of the opinion rendered on August 29th is sufficient to distinguish the case from the one at bar.

In *Board of Commerce v. Gorman,* 19 Wall. 662, 22 L. Ed. 226, it was held that the date of the entry governs, whether signed or not, when the decree was of simple character and required no "settling" by the judge.

In *Polleys v. Black River Co.,* 113 U. S. 81, 5 Sup. Ct. 369, 28 L. Ed. 938, it was ruled that the time limit upon error proceedings begins to run only from the date of the "entry" of the judgment, or decree, or order upon the records of the court.

In discussing the proceedings had before the trial court pursuant to the requirements of 77B(c), U. S. C. A., Title 11, Sec. 207(c), and after reciting the directory provisions of the statute, counsel for appellants make the statement:

> "The subsection specifically requires an order fixing the amount of the bond of every trustee."
>
> (Op. Br. p. 62.)

While that is true, it is also equally true that the statute does not require that the amount of the bond shall be fixed at the time the court acts on the Petition for Relief.

All of the acts prescribed for performance by the Judge under that section, both directory and mandatory, and including the particular items mentioned by counsel (Op. Br. p. 62), may be performed at the time the Petition and Answer is approved, *or at any time thereafter.*

Section 207(c) prescribes a vast number of duties to be discharged by the Judge, but the subsection is prefixed by this statement:

> "Upon approving the Petition or Answer, or at any time thereafter, the Judge, in addition to the jurisdiction and powers elsewhere in this section conferred upon him, (1) may, after hearing * * *"

Hence it is plain that at the conclusion of the hearing on the Petition or Answer the court may at its discretion confine its initial order to the sustaining or denial of the Petition, and defer until some future time the rendition of subsequent orders on such incidental matters as the fixing of the Trustees' bond and other like items which were included in the so-called formal order voluntarily presented to the court by appellants here on July 13th, 1938.

Where the court elects to defer its order as to any or all of the minutae prescribed by section 207(c),—as it may with propriety do under the express provisions of the Act—it would be inconceivable to consider that by so doing the time for taking an appeal from the court's order approving the Petition for Relief would be thereby automatically extended until thirty days after such indefinite future date as the court might finally decide to act upon the last of the incidental requirements enumerated in that subsection. If that were the case corporate debtors and trustees would be in the impossible position of having complied with a series of court orders, only to find that when the final requirement of the subsection under discussion had been ordered by the court, inter-

vening objectors might take an appeal from the last order entered, on the theory that no final order had theretofore been made.

Under such a construction the time for taking an appeal could be indefinitely extended by the routine process of presenting a succession of amended or modified orders for signature by the trial court. Such was certainly not the Congressional intent in enacting subsection (c), Section 24 of the Bankruptcy Act.

The paramount reason for this appeal, and the nub of appellants' supposed grievance, is that the trial court approved Debtor's Petition for Relief, and not that the trial court thereafter fixed the Trustees' bond at $5000.00 or entered an order as to any of the other comparatively inconsequential matters included in the court's order of July 13th, 1938.

Counsel direct attention to paragraph (6) of the so-called formal order, which designates July 15th, 1938 as the date when the Trustees were to take over and the books of the Debtor ordered closed.

It must not be overlooked that the court had already, on July 9th, 1938, ordered that the Debtor's property be placed in the hands of the Trustees, had instructed the Trustees to do their duty, and declined to impose any immediate restrictions on their course of action. What the court said was:

> "I will leave it to them to get together for the purpose of carrying out the real purpose of the corporation."

THE CLERK WAS NOT REQUIRED TO GIVE NOTICE OF THE MINUTE ENTRY OF THE ORDER OF JULY 9TH, 1938, ALL OF THE PARTIES BEING PRESENT WHEN SAID ORDER WAS RENDERED.

In appellants' Statement of Facts (Op. Br. p. 48), it is stated that no notice of entry of the Clerk's Minute Order was ever given to counsel for appellants, and they had no knowledge that such Minute Order had been entered.

Under Equity Rule 3 of the Rules in force on July 9th, 1938, the Clerk was required to enter the Court's Order in his "Order Book", but under Equity Rule 4 was not required to notify the parties of such entry, unless they were absent when the order was entered.

Rule 3 of the rules in force on July 9th, 1938, reads as follows:

> "The Clerk shall also keep a book entitled 'Order Book', in which shall be entered at length, in the order of their making, all orders made or passed by him as of course and also all orders made or passed by the judge in chambers.
>
> He shall also keep an 'Equity Journal', in which shall be entered all orders, decrees and proceedings of the court in equity causes in term time."
>
> (28 U. S. C. A., Secs. 721-725, p. 42.)

Rule 4 of the rules is as follows:

> "Neither the noting of an order in the Equity Docket nor its entry in the Order Book shall of itself be deemed notice to the parties or their solicitors; and when an order is made without prior notice to, *and in the absence of,* a party, the clerk, unless otherwise directed by the court or

judge, shall forthwith send a copy thereof, by mail, to such party or his solicitor and a note of such mailing shall be made in the Equity Docket, which shall be taken as sufficient proof of due notice of the order." (Italics ours.)

(Idem.)

It may be noted in passing that under the new Rules of Civil Procedure, Rule 79 follows substantially Rules 3 and 4 above quoted, and does not require that the parties be notified of the Clerk's entry. However, we take it that inasmuch as the effective date of the new Rules is three months subsequent to the adjournment of the 75th Congress, these proceedings would not be governed by the new Rules in any event. Even under a liberal construction of Rule 86 of the new Rules, relative to their application to matters pending on the effective date except to the extent that in the opinion of the court their application in a particular action pending would not be feasible or would work injustice, the former procedure will apply to the case at bar, for certainly the Clerk could not be expected on July 9th, 1938 to anticipate any requirement of the new Rules which later came into effect.

It is evident from the Affidavit of the Clerk, which appellants took occasion to file herein, that the Clerk had well in mind that under Rule 4 above quoted it was not necessary for him to give written notice of the entry of the Minute Order, inasmuch as the respective parties were present when the court rendered its opinion and order. (Affidavit of O. E. Benham, p. 2, lines 21-25.)

For the reason stated, appellee's Motion should be granted and the appeal dismissed.

APPELLEE'S ANSWERING BRIEF ON MERITS.

STATEMENT OF THE PLEADINGS AND JURISDICTIONAL FACTS.

Appellants have adequately presented Statement of the Pleadings and other essentials (Op. Br. 1-4), except that the so-called "final Order" was entered by the District Court on July 13th, 1938, and not on June 13th, 1938, as inadvertently appears on page 3, Opening Brief; and that said order of July 13th, 1938, was preceded by the court's rendition of its oral opinion and decision at the conclusion of the hearing on July 9th, 1938, which was followed by the Clerk's minute entry thereon made on the same day.

STATEMENT OF THE CASE.

WHITE-GORDON AGREEMENT FOR ACQUISITION OF PROPERTY AND FINANCING OPERATIONS.

Prior to the Debtor's incorporation Messrs. White and Gordon were partners in a joint mining venture, in which Mr. Gordon had already invested $24,000.00 prior to Mr. White's entry into the partnership. (R. 85.) The corporation was formed at the instance of Mr. White, who objected to a continuance of the partnership status.

As distinguished from appellants' statement that Gordon had paid $1500.00 on the purchase price of the "Leader" Group and furnished certain services which the parties agreed to value at $24,000.00 (Op.

Br. 4-5), the record shows that Gordon owned the lease and option on the property, installed machinery, put the shaft in condition, litigated the title for four years, and that "the amount of his investment prior to the incorporation of the Penelas Mining Company was $24,000.00". (R. 83-84.)

CORPORATE ORGANIZATION AND FINANCING.

Under this head (Op. Br. 8) appellants' Statement of the Case fails to show that of the principal sum of $140,000.00 advanced by the Whites, $102,000.00 only was past due and unpaid on June 1st, 1938, and the balance of $38,000.00 matured on or about that date. (R. 5.)

Appellants err in stating that the sum of $20,000.00 paid by the company on the purchase price of the Leader Group was from "apparent profits". (Op. Br. 9.) The money so paid by the company consisted of royalties on production due the Penelas Estate, as the then legal owner, under the terms of the company's lease and option, and were derived from company earnings on ores mined and milled. (R. 433-434.)

The statement that "of the actual moneys which went into the enterprise, Gordon furnished $1500.00 and Mr. White advanced, or caused to be advanced, $164,000.00" (Op. Br. 9) is not in consonance with Mr. Gordon's undisputed testimony mentioned supra, that the amount of his investment prior to incorporation was $24,000.00.

COMPROMISE EFFORTS OF GORDON AND WHITE PRIOR TO PETITION FOR RELIEF.

A full understanding of the individual and corporate negotiations which preceded the filing of Debtor's petition for relief may be had only by a review of the extensive correspondence interchanged between all parties from November, 1937, to May, 1938, as comprised in Debtor's and Interveners' exhibits. (R. 288, 349-352, 376-380, 380-384, 385-386, 387-392, 392-394, 395, 396-397, 398-400, 401-403, 407, 408, 414, 417-421, 438, 441-449, 451-457, 458-461, 466-470, 476-477.)

The correspondence shows that the Debtor, and Gordon and Rowson as its majority directors, exhausted every effort to meet White's demands on any reasonable basis. For example: Gordon signed and forwarded to White's attorney, Mr. Little, an irrevocable proxy on the pledged stock, to be exercised on the death of either Gordon or White (R. 461, 464, 466, 467-469), and later informed Mr. Little that he was willing to sign a proxy in the form demanded by White if he could have "reasonable safeguards". (R. 470, 474.)

It is in evidence that appellants were offered a settlement of their claims upon the basis of a new promissory note payable in installments of $3000.00 per month for four months commencing July 1st, 1938; $4000.00 on November 1st, 1938, $4000.00, December 1st, 1938, and $5000.00 for each month thereafter until fully paid, with interest at six per cent per annum payable monthly, and secured by a mortgage on all of the corporate assets, with right of foreclosure

for default in payment of any installment of principal or interest for two consecutive months. (R. 168-169.)

White's proposal that Gordon remain as Vice-President, retain his title as general manager (but stripped of all managerial powers) at a reduced salary of $500.00 per month, offered no assurance that either the offices or the salary would continue for any definite period. (R. 262.)

DEBTOR'S RESOURCES AND OPERATING RECORD.

A summary of the testimony for the Debtor demonstrates that at the time of the hearing its mineral estate had finally emerged from the long period of exploration and heavy expenditures essential to its development as a commercial producer at depth. The more or less erratic ore depositions in the upper levels of the mine had been established as persistent and higher grade ore bodies at the lower horizons, as evidenced by the increased mill head values and larger ore shoots on the fifth and sixth levels.

L. D. Gordon is a mining engineer and mine manager of broad experience and successful accomplishment. (R. 82-5.) He expressed confidence that the entire corporate indebtedness can be paid in full in two to three years if permitted to continue operations (R. 112-113), and in part based his opinion on recent developments on the 500 and 600 foot levels which took place within the period of two or three months immediately preceding the hearing, and the expecta-

tion of the ore continuing to a depth that similar properties in the same general region and of the same geology have continued. (R. 89.)

The Debtor has clear title to its property, which was purchased for $45,000.00 and is free and clear of liens or other encumbrances. (R. 90.)

Gordon also based his opinion on the fact that at the time of hearing Debtor had about 12,730 tons of ore assured; the mill heads for the first twenty days of June, 1938, averaged $17.00 per ton, with an extraction of about 90%, and during that 20-day period Debtor had shipped $14,800.00 in bullion, and based on sampling of mill heads and tails expected to ship between $7000.00 and $7500.00 additional bullion for the last 10 days of June. (R. 91.)

Gordon gave an estimate of 30,000 tons of potential ore between the 600 and 1000 foot levels, of a conservative estimated value of $15.00 per ton, and based on an extraction of 90% would leave $13.50 per ton. (R. 93-94.)

Operating costs, exclusive of interest, depreciation and depletion, have been $8.07 per ton for the past seven months, including the winter period; that it is possible to effect sufficient changes to take care of interest, and thus leave a profit of $5.50 per ton. On that basis the entire indebtedness could be taken care of in two years, but the witness allowed an extra year as a safety factor. (R. 113.)

Computed on the basis of 42,730 tons of assured and potential ore and a mill return of $13.50 per ton, with a net of $5.50 per ton, the net operating profit on

such tonnage would be $234,965.00, and it would take a little over two and one-half years to mill that tonnage.

Although appellants' promissory notes are unsecured, other than the pledge of one-half of Gordon's stock, Gordon stated that if the maturity dates of Debtor's notes are extended, he would acquiesce in the company's execution of a mortgage to White upon all of the Debtor's assets. (R. 113.)

Planned reduction in operating costs would effectuate an annual saving of $10,800.00. (R. 113-114.) That amount is more than sufficient to take care of interest charges of $700.00 per month on what was then an indebtedness of $140,000.00.

Development work, although non-productive, with negative results in the early stages, is of value to general development because it allows certain areas to be eliminated, and enables work to be confined to more productive areas, and the natural result is to eliminate waste. (R. 171.)

Byron James, Debtor's bookkeeper, testified that the book value of Debtor's properties after depletion was $183,219.30 as of June, 1938; mining and milling machinery, buildings, etc., $125,795.50 after allowing two years' depreciation in the sum of $33,424.44; and total assets $334,389.00, plus cash on hand, etc. (R. 144 et seq.)

Mr. James testified as to Debtor's Exhibit 19, which is a statement of operating results for the six months' period from December 1st, 1937 to May 31st, 1938; that the expenses ran about $13,000.00 per month, in-

cluding $700.00 per month interest on the notes, and everything else except depreciation; that the total bullion shipments for June would be $22,000.00, leaving a net profit of between $8000.00 and $8500.00. (R. 178.)

On cross-examination the witness testified as to the source of funds shown in Debtor's Exhibit 20, as follows:

Gordon-White Investments	$ 48,000.00
White Loans	140,000.00
Profit from mining operations	60,716.33
Total	$248,716.33

That the assets acquired by the Debtor comprise its mining property, development work, water rights, buildings, mill, Machinery, tools and equipment, trucks, road work and supplies on hand, valued at $247,443.51

Thus leaving a net asset balance of	$ 1,272.82
Total quick assets to May 31st, 1938, including cash on hand, bullion in transit, etc., amounting to	$ 20,518.43
Current liabilities (payroll, taxes, etc.)	19,245.61
Leaving a balance of	$ 1,272.82

Further analysis of Exhibit 20 shows a gross ore production from February 1st, 1936 to May 31st, 1938, of	$401,560.65
Direct operating expense	261,799.83
Gross operating profit	$137,436.62

(R. 187-198.)

The total cash invested and earned to May 31st, 1938, amounted to $587,000.00.

The quick assets of $1,272.82 cash do not include other property assets having an aggregate value of $248,443.51.

The fallacy of appellants' attempted diminution of the company's assets as of May 31st, 1938 (Op. Br. 13), is shown by a glance at its tangible physical assets, comprising the mine, mill and equipment representing an investment of $247,443.51 (R. 193), over and above its so-called quick assets. Nor is it entirely fitting to charge the Debtor with four years' operations, when the fact is that its mill was not completed until February, 1936.

Although auditors' reports for the year 1936 (Interveners' Ex. "F", R. 305) shows a net profit only of $4560.60 from the commencement of operations on February 1st, 1936 to November 30th, 1936, it should be noted that the net operating profit before deducting $15,833.19 for depreciation and $4869.39 for depletion was $25,932.72; and that for the year 1937 (Interveners' Ex. "G", R. 317), the net loss of $5765.74 is computed after deducting $19,502.74 depreciation from a net operating profit of $13,737.00. During the year 1936 interest was paid on the Interveners' loans in the sum of $6166.59, and for the year 1937 in the sum of $7848.88.

Actually the Debtor's operations during both of the years 1936 and 1937 shows that good progress was made toward the ultimate objective, when it is considered that deductions for depletion and depre-

ciations are merely book entries which do not represent any actual expenditure of cash from the corporate earnings, and that the interest charges are proportionately reduced as the principal indebtedness is paid.

John N. Davis is the Debtor's mill man, and testified that Penelas ore is very simple ore with no metallurgical difficulties; that the values are erratic, being up one day and down the next, but the average being very fair (R. 173), and explained that what he meant by erratic is that the mill head values ran from $10.00 to $20.00. The mill is very efficient, and the ratio of gold and silver values in the ore is $9.00 gold to $1.00 silver.

There is no noticeable depreciation in the mill—about 10%—but because of its use it is better now than when it was new, because broken in and no more adjustments, and the cost of upkeep and maintenance is less. There is no actual depreciation in the power plant or pumping plant, and the normal life of the plant is thirty years and then would have only a scrap value. (R. 173-174.)

James McLaughlin is the mine foreman and shift boss. At the outset of this witness' testimony it was stipulated that the mine was in very bad condition prior to the White-Gordon partnership. (R. 176.)

The witness testified that the mine is completely equipped; between 5000 and 6000 feet of track laid in the workings; 1500 feet of ventilator pipe, air and water lines in all drifts and cross-cuts, about 6000 feet in addition to what is in the shaft. There is no

actual depreciation in the mining plant and equipment, and the buildings are as good as when built. (R. 177.)

E. J. Schrader is a consulting engineer who was employed by both parties for an independent examination. He spent two and one-half days on the property and went as far as he could within the time limit, which permitted him to examine only the vicinity of the main workings. (R. 211.) He did not make a detailed examination, but merely preliminary.

The witness substantially verified the testimony of Mr. Gordon as to the assured ore tonnages down to and including the 600 foot level, with a mill head value of probably $20.00 (R. 212, 238), and stated that he would expect the ore to continue down to the 6th level and below, as the same geological conditions are present and the vein structures are there (R. 214); and that as you go down the ore shoots on the 5th and 6th levels get better defined. (R. 215.) The witness further stated "I can't see any reason why the Penelas vein should not go down to a thousand feet or more, and in drifting North on it, I see no reason why other ore shoots should not be picked up and I would consider that the present last horizon in the mine is more favorable for additional ore shoots than the upper portions of the vein, where the conditions are very badly broken". (R. 216.)

This statement was substantially reiterated by the witness (R. 222), who explained the geological conditions upon which he predicated that statement, stated that on the first and second levels the country is

broken up and that he would prefer to go down to the lower levels where the formation is more solid and do his drifting there. (R. 222-223.)

Again on cross-examination Mr. Schrader said he believed that the vein will continue to a possible depth of a thousand feet; that he saw no evidence whatever on the sixth level that the ore should not continue down, and that he saw no reason why the ore should not continue through from the evidence on the sixth level. (R. 238-239.) Although as an engineer reporting on the property he would not make a statement that there are 30,000 tons of possible ore, or potential ore, with a grade of $15.00 per ton below the 600 foot level, the witness stated "I would say it is possible * * * It is possible that there would be". (R. 239.)

Mr. Schrader found that the mill heads for the first twenty-five days in June, 1938, averaged $17.45 per ton and the tailings ran $1.81 per ton. The ore on the sixth level averaged $27.45 per ton, and the average of muck samples was $23.60 per ton. The witness stated that he would have followed substantially the same plan of development as was followed by the Debtor's management (R. 227), and acquiesced in Mr. Gordon's opinion that the cost of development in establishing negative results is money well spent, and necessary where pioneering and the geology has not been previously determined by others, although it naturally reduces the profits from the operations in the early stages. (R. 228.)

The witness found everything being done in a very good miner-like fashion; the whole thing looked like a well-run property; the mill was in good shape; the management had done an excellent piece of work in the shaft, the stopes were in good shape, and the whole thing made a good impression. (R. 230-232.)

In answer to a question as to whether he had experienced a situation where a mining property encountered lean years during the early stages of development, which by continued work established a producing property, the witness stated that was in accordance with the history of mining, and that the Consolidated Virginia is probably a good example. (R. 232-233.)

With the exception of executive salaries, the Debtor's operating costs are normal for a mine in that condition and under Nevada operating expenses. (R. 243.)

During the course of the hearing Mr. Schrader made a second visit to the Debtor's property, and upon being recalled for further examination testified that he had found additional development on the lower levels since his previous visit; that the drift on the 600 foot level had been extended to about 150 feet, and that the ore shoot was something over 130 feet, instead of 110 feet as measured on his previous visit the week before (R. 246-247); and that on the 500-foot level a crosscut had been driven since his previous visit and the width of the ore extended from 5 or 6 feet to 15 feet. (R. 248.)

Mr. Schrader's unwillingness to fully corroborate Mr. Gordon on potential ore estimates below the 600-

foot level is readily understandable. Mr. Schrader was on the property for a few days only. Naturally his two brief visits on what he characterized as a preliminary examination could give him no such knowledge of the mine as Gordon acquired through intimate association over a period of years.

The record is convincing that Gordon has performed an excellent job, as evidenced by the testimony of the unbiased and expert witness, Mr. Schrader. Nor did Mr. White's personal adviser and engineer, Mr. McDaniels, have any fault to find on that score. (R. 449-450.)

Gordon's only fault has been that in common with all mining engineers he was unable to see beneath the surface, or to do more than estimate the mineral values at unexplored depth. He has, however, admirably carried on the tradition of his profession by demonstrating that his faith in the property has been fully justified by developments to date.

When White and Gordon executed their agreement on May 1st, 1935 partial payments amounting to $10,000.00 only had been made on the property, and there remained a balance of $35,000.00 yet to be paid on the agreed purchase price. The property was practically barren of improvements or development at depth and had yet to be equipped with mining machinery and milling plant.

White did not advance the necessary funds to liquidate the balance of the purchase price of the property. (R. 35-36 and Op. Br. p. 7.)

WHITE'S UNWILLINGNESS TO SELL, OR TO PLACE A PRICE ON HIS INTEREST.

On cross-examination White stated that he would not care to give an option on his interest at any price, without further study of the situation. (R. 275.) In December 1937 White placed a value of $500,000.00 on the property as a whole. (R. 385-386.)

This attitude on the part of Mr. White demonstrates that he has no real cause for concern, and no justification for minimizing the undoubted value of the property.

It is established in the record both by oral and documentary evidence that the Debtor's actual assets far exceed its liabilities. As of May 31st, 1938 the assets, exclusive of the mine itself, total $184,421.89, comprising improvements, inventories and cash on hand.

The indubitable value of Debtor's property is further corroborated by appellant R. H. White's testimony—on cross-examination Mr. White stated that he informed Gordon he would be willing to take $250,000.00 for his interest, promissory notes and the money the company owed him, but was not willing to sell the stock interest of his family, plus the principal and interest owing him by the company for $250,000.00 "without further study of the situation regarding the value of the mine, and the further consideration of Gordon and Rowson being in control, which was very unsatisfactory to White". (R. 274.)

As Mr. White's family owned one-half of the stock originally acquired by White, this evaluation meant

that White would be willing to sell only a one-fourth interest in the mine and the corporate indebtedness to him for $250,000.00. As the total cost of White's original one-half interest in the mine was only $24,000.00, and his aggregate loans to the company amounted to $140,000.00, this meant that White placed a minimum valuation of approximately $86,000.00 on the one-fourth interest to be retained by his family, or a valuation of $344,000.00 on the combined interests of all.

Gordon testified that when he made his initial visit to Cleveland, Ohio, in November 1937 responsive to White's request, White informed him that he had reason to believe that the mine could be sold for a very substantial price and mentioned a minimum of $300,000.00, of which $200,000.00 should be paid in cash (R. 139); but that White would not give any option on the mine (R. 140); and that White had never put a price on his stock interests in the Debtor corporation, although Gordon had endeavored to have him do so. (R. 143.)

Efforts to minimize the value of Debtor's property are nullified by Mr. White's own admissions of its worth. He placed a substantial value on the White interests, regardless of the Company's indebtedness.

As the property has passed the crucial stage and attained the productive status foreseen by Gordon and developed through years of effort, it is logical to believe that even Mr. White's figures are entirely too conservative.

APPELLANTS' ASSIGNMENT NO. I.

AUTHORITATIVE CORPORATE ACTION WAS TAKEN BY MAJORITY DIRECTORS.

Rowson testified (R. 121-122) that Gordon was present on May 2nd, or about that date, and stated: "Mr. Gordon himself could probably answer that question definitely as to being present on that particular date."

Gordon testified that he was present at a regular meeting of the Penelas Mining Company at which the directors' resolutions were adopted, on May 2nd, 1938 (R. 117), and that the resolutions were in fact adopted.

White's attorney, Joseph Little, was advised of the contemplated step to be taken by the Debtor under 77B when he was in Reno, Nevada, prior to the filing of the Petition for Relief. (R. 166.)

Rowson's suggestion to change his testimony (R. 165-166), was not carried into effect. Hence the initial testimony given by Rowson, on his recollection as to the time when the first draft of the Petition for Relief was prepared, stands without change and unrefuted. It is apparent that in the absence of his journal record Rowson did not recall the date of his conference with attorney Little in Reno.

In the case at bar appellants are the only creditors of the Debtor, and as such it is a foregone conclusion that appellant R. H. White as the principal creditor in interest and one of the three directors would have voted in the negative on any resolution authorizing the filing of debtor's Petition for Relief. Notice to director White at his distant home in Cleveland, Ohio,

would have been an idle gesture at most, and appellants have lost nothing and suffered no jeopardy by lack of notice—even if it be assumed that any notice was in fact necessary for the directors' regular meeting of May 2nd, 1938.

> "The rule requiring notice will be reasonably construed so as to facilitate rather than to prevent the efficient carrying on of the company's business. Lack of notice to each director may be excused in a case of emergency calling for immediate action, or where some of the directors are out of the jurisdiction or where an absent director is so antagonistic to his codirectors that a notice to him would have been nugatory."
>
> (14a *C. J.*, sec. 1846, p. 89, and numerous cases cited in notes 25-28).

In any event, corporate action on a matter of such vital import to the company could have been taken by a majority of the directors without a formal meeting. Section 77B is not construed as requiring adoption of a formal resolution approved by a majority of the directors, in order to authorize the filing of Petition for Debtor's relief.

> "A majority of the Board of Directors may authorize the filing of a petition in voluntary bankruptcy without the consent of a director owning practically all of the stock of the corporation, and without submitting the matter to a vote of the stockholders. (Citing Bell v. Blessing, C. C. A. 9—225 Fed. 750.) In one case the court retained jurisdiction of the proceeding although the filing of the petition was authorized by only two of the seven directors, the other five being dis-

qualified because they had claims against the corporation. (Citing In re People's Warehouse Co., 273 Fed. 611.)"

(1 *Gerdes on Corporate Reorganizations,* Sec. 112, p. 267.)

"Creditors may not attack the jurisdiction of the court on the ground that the directors acted without authority in filing the petition; nor on the ground that the object of the directors was to avoid personal liability in a suit threatened by minority stockholders."

(Idem, at p. 269.)

As against the earlier decisions of the Nevada Supreme Court in *Yellow Jacket Mining Company v. Stevenson* (5 Nev. 224) and *Hillyer v. Overman Silver Mining Company* (6 Nev. 51), cited by appellants (Op. Br. 24), the more recent decisions of the Nevada court recognize the power of a majority of the directors to act authoritatively for the corporation.

In *Defanti v. Allen Clark Company* (45 Nev. 120, 198 Pac. 549) the Nevada Supreme Court said:

"The general corporate law of this state provides, inter alia, that a majority of the whole number of trustees or directors shall form a board for the transaction of business, and that every decision of a majority of the persons duly assembled as a board shall be valid as a corporate act, subject to the provisions of the By-Laws and of the laws of this State. Rev. Laws, 1127. The question as to when the trustees or directors shall be considered as duly assembled is not settled by the statute. This seems to have

> been left by the law makers to the corporate itself to be covered by its By-Laws * * *"

The section of the statute construed by the court (Rev. Laws, 1127) corresponds to Section 718, N. C. L. 1929, which provides, *inter alia:*

> "A majority of the whole number of trustees or directors shall form a board for the transaction of business, and every decision of a majority of the persons duly assembled as a board shall be valid as a corporate act, subject to the provisions of the By-Laws and of the laws of this State."

It was aptly stated by the trial court in its Opinion (as quoted in Op. Br. p. 20) that any defects so far as the directors' meeting was concerned could even now be corrected and ratified. (R. 37.) Somewhat inconsistently appellants then argue that if the court had been cognizant of the facts developed at the hearing it would have been compelled to disapprove the Petition. (Op. Br. 23.) Of course the trial court rendered its opinion in light of the facts so presented at the hearing, and took occasion to explain why the alleged defect was immaterial.

Appellants' objection to the Petition did not raise the issue as to whether it had been authoritatively filed, but injected this question at the hearing under their plea that the Petition was not filed in good faith.

> "Whether a voluntary petition filed by a corporation, for reorganization under Section 77B, was properly authorized by resolution of the Board of Directors, is a question of fact to be raised by answer traversing the facts alleged in the peti-

tion and denying good faith on the part of the petitioner."

(*Johnson on Bankruptcy Reorganization,* Sec. 260, p. 237, citing *In re Marine Transit Corp.,* C. C. A. 2—79 Fed. (2d) 232.)

"On the filing of a petition under 77B the cause must proceed according to such section; and under the provision requiring the Judge to determine the issues presented by creditors controverting the facts alleged in the Debtor's petition, it is the duty of the court, if denials of material facts are properly made in accordance with the rules * * * to hold a summary hearing thereon."

(8 *C. J. S.* 1783, Sec. 832.)

In our discussion of the question of directorial action on the Petition we have omitted to distinguish the case of *In re Community Book Co., Inc.* (D. C. Minn.—10 Fed. (2d) 616), cited by appellants (Op. Br. 25), where the company's President alone assumed to file petition in bankruptcy in behalf of the corporation. Neither the petition nor the verification recited any authority granted by the Board of Directors, it was conceded that there was no action by the Board, and the petition was defective in other respects.

The court also cited *Lone Star Ship Building Company, Bankrupt* (6 Fed. (2d) 912), holding that it was not necessary to give notice of a meeting of the Board of Directors who were adversely interested, and that the authority granted at the Board meeting was sufficient. Although that case had no application

to the question presented in the *Community Book Company* case, it is definitely applicable to the case at bar.

WHITE IS NOT IMMEDIATELY ENTITLED TO TRANSFER OF PLEDGED STOCK.

The White-Gordon agreement of May 1st, 1935, is silent as to when the pledged stock may be deemed forfeited and so entitled to transfer, nor is any time limited for redemption of the pledged stock. Ordinarily, if Gordon were a party to the indebtedness, it would seem that the stock would be forfeit upon default of the principal, but certainly that condition does not obtain where, as here, Gordon is neither surety nor guarantor for the indebtedness, and the principal debtor has applied for relief which may be reasonably expected to extend the due date of the obligation.

The agreement of May 1st, 1935, between White and Gordon contains no provision for transfer of the pledged stock, or anything more than a mere hypothecation of the stock as security for the repayment of White's loans to the company. Gordon is neither a maker nor endorser of the Debtor's promissory notes, and as testified to by Gordon (R. 161-163), it was never contemplated that the pledged stock would be transferred. In the absence of an agreement to that effect White has no right to demand a transfer until such time as he has exhausted his remedy against the

Debtor. Certainly White may not sue Gordon on the promissory notes, inasmuch as Gordon is neither a maker nor endorser.

> "Where the parties have made an agreement relating to the right of the pledgee to enforce collateral, their rights are governed thereby."
>
> (49 *C. J.*, p. 1021.)

> "Where the obligor merely pledges collateral without assuming personal liability for the collateral or the principal debt, no personal judgment should be entered against him in a suit on the collateral by the pledgee."

While it is true that where the guaranty is absolute the creditor need not first pursue and exhaust the principal before proceeding against the guarantor, where, as here, Gordon is neither surety nor guarantor, White is under the necessity of first exhausting his remedy against the Debtor corporation.

> "A Surety undertakes to pay the debt of another. A Guarantor undertakes to pay if the principal debtor does not or cannot. A Surety joins in the contract of the principal, and becomes an original party with the principal. The Guarantor does not join in the contract of his principal but engages in an independent undertaking. A Surety promises to do the same thing which the principal undertakes; the Guarantor promises that the principal will perform his agreement and if he does not, then he, the Guarantor, will do it for him."
>
> (*Stearns on Suretyship*, 3rd ed., Sec. 6, pp. 5-6.)

> "Contracts of guaranty endorsed upon promissory notes are the most common forms of absolute guaranty. The time and amount of payment are fixed, and the liability of the guarantor depends upon no other condition than that of non-payment by the maker. If the guaranty is absolute the holder is not required to make demand upon the maker and give notice to the guarantor of the default."
>
> (Idem, Sec. 61, p. 73.)

The Nevada statute transferring title to stock by delivery and written transfer clearly does not apply where the delivery is qualified by a contemporaneous written agreement. (Op. Br. pp. 36-37, re Nevada Compiled Laws 1929, Pocket Supp., p. 147.)

If White were permitted to have transferred Gordon's pledged stock, it would mean that at such time as White shall have been repaid the full amount of his claim and interest he would then have acquired a total of 112,500 shares, representing a three-fourths interest in the Debtor corporation, for a total investment of $24,000.00, while Gordon with a like investment would have only a one-fourth interest.

The assumed issue presented by White's insistence on an immediate transfer of the Gordon stock, without first exhausting his remedy against the principal Debtor, presents a collateral issue which is not proper for consideration in these proceedings. The Corporate Reorganization Act is for the relief of corporate debtors, and not for the purpose of determining factional differences between stockholders.

"This section contemplates reorganization and was not intended to provide a forum to settle collateral issues between parties who might be interested in debtor."

(*In re Utilities Power & Light Corp.*, C. C. A. Ill. 1937, 91 Fed. (2d) 598.)

APPELLANTS' ASSIGNMENT NO. II.

COURTS WILL NOT ANTICIPATE INABILITY OF DEBTOR TO PRESENT ACCEPTABLE PLAN.

Appellants' summation of their Assignment No. 2 (Opening Brief, p. 27) shows that appellants would deny the Debtor any opportunity to demonstrate its right to proceed under the Act by submitting a feasible and practicable plan of reorganization. The arguments directed to that point by appellants could only avail after Debtor's reorganization plan shall have been submitted to the court below.

Although in *Wellston v. Conway* (94 Fed. (2d) 736), the court held that a debtor's petition for reorganization may be dismissed even though a plan of reorganization had not been submitted, when the lack of good faith of the debtor appears, and that the lack of good faith may be shown by lack of any reasonable possibility of success of any reorganization. In that case the outlook for the debtor was hopeless and readily distinguishable from the situation presented here.

It is well established that the same searching intensity is not required on hearing of the petition for

relief as on the hearing of a proposed reorganization plan.

(*Witter's Associates v. Gypsum Company,* C. C. A. 5, 93 Fed. (2d) 746.)

The primary purposes of the Act is to maintain the Debtor's status quo pending a reasonable effort to reorganize its financial structure.

SECTION 77B IS A REMEDIAL STATUTE, AND AS SUCH IS TO BE LIBERALLY CONSTRUED.

"Corporate reorganization section of bankruptcy act should be accorded fair and liberal constructions to forward its purpose."

(*Campbell v. Alleghany Corp.,* 75 Fed. (2d) 947, cer. den. 53 Sup. Ct. 92, 296 U. S. 581, 80 L. Ed. 411.)

"Provision of bankruptcy act relating to corporate reorganization is remedial statute to be construed liberally."

(*In re Lake's Laundry,* 79 Fed. (2d) 236, cer. den. *Lake's Laundry v. Braun,* 56 S. Ct. 144, 296 U. S. 622, 80 L. Ed. 442.)

"U. S. C. A., Sec. 207, providing for corporate reorganization is of remedial character and proposes that debtor and creditors may have fair and reasonable opportunity to submit plan of reorganization 'so that the debtor may live and the creditors will receive more than is obtainable upon a liquidation sale'."

(*In re Schroeder Hotel Co.,* 86 Fed. (2d) 491.)

"Section of Bankruptcy Act providing for reorganization of corporate debtors is remedial and should be liberally construed to carry out its purpose."

(*In re Prima Co.,* 88 Fed. (2d) 785.)

STATUTORY EXCEPTION DISPENSING WITH CONSENTS OF CREDITORS AND STOCKHOLDERS.

Section 77B (U. S. C. A. Title 11, Sec. 207, p. 1059) provides:

"(b) A plan of reorganization within the meaning of this section. * * * (5) shall provide in respect of each class of creditors of which less than two-thirds in amount shall accept such plan (unless the claims of such class of creditors will not be affected by the plan, or the plan makes provision for the payment of their claims in cash in full), provide adequate protection for the realization by them of the value of their interests, claims, or liens, if the property affected by such interests, claims or liens is dealt with by the plan, either as provided in the plan (a) * * *, or (d) by such method as will in the opinion of the judge, under and consistent with the circumstances of the particular case, equitably and fairly provide such protection * * * (7) shall, in case any creditor or stockholder or class thereof shall not be affected by the plan, specify the creditor or stockholder or class or classes thereof not affected and contain such provisions with respect thereto as may be appropriate, and in case any controversy shall arise as to whether any creditor or stockholder or class thereof shall or shall not be affected, the issue shall be determined by the judge

after hearing upon notice to the parties interested; (8) shall specify what claims, if any, are to be paid in cash in full * * *''

The author of "McKeown on Federal Debtor Relief Laws" was a member of the House Committee which drafted the statute under consideration, and the textual matter furnished by the author is enlightening as to what was intended by its sponsors, with particular reference to the elimination of creditors and stockholders' consents under certain conditions.

"It was considered by the committee of the House that the provisions of the Act were sufficiently broad so that any plan appearing to the court as equitable and desirable might be submitted to the creditors and stockholders if the court so desires. In its report the House committee said at page 5:"

(*McKeown on Federal Debtor Relief Laws,* pp. 138-139.)

"If a debtor shall fail to obtain the required acceptances in writing from the creditors, then under the provisions of the Tarver amendment he may submit a proposal to the court, affecting both secured and unsecured debts, and the court may approve and make effective the plan submitted, notwithstanding the failure of the debtor to obtain the necessary acceptances in writing of the proposal."

(Idem, at p. 26.)

The statutory exception dispensing with customary consents of creditors and stockholders is recognized

by other text writers and by those courts to whom the question has been presented.

(Vol. 7, *Remington,* 1938 Supp., p. 288);
(*Carmichael Bankruptcy Handbook,* p. 160.)

The statute does not contemplate that in the absence of consents a plan must necessarily provide for the payment of non-assenting creditors in cash. Such a construction would nullify subsection (b) (5) (d), supra.

> "While a fair plan must give due recognition to the interests of all classes of creditors and stockholders, this does not mean that recognition may only be given by cash payment in part or in full."
>
> (Vol. 2, *Gerdes on Corporate Reorganizations,* Sec. 1086, pp. 1741-1742.)

Jurisdiction was sustained by this Court in *Ogilvie v. Dexter Horton Estate* (86 Fed. (2d) 282—C. C. A. 9, cer. granted January 11, 1937, 81 L. Ed. 454—not yet reported), in which it was held:

> "Where required consent of creditors is not obtained, or court declines to approve plan as fair and equitable, it may dismiss proceedings."
>
> "District Court had jurisdiction of voluntary reorganization proceedings, where petition stated facts showing need for relief, that corporation was unable to meet its maturing debts, and that it desired a plan of reorganization, regardless of whether it would have had jurisdiction to appoint an equity receiver."

In *Carlisle Lumber Co. v. Hope et al.,* C. C. A. 9, 83 Fed. (2d) 92, the holders of 92.24% of the outstanding

bonds objected because the plan proposed would have reduced their claims by $312,260.12.

Reorganization was permitted over the objections of and without the consent of dissenting bondholders in:

Central States Life Ins. Co. v. Koplar Co. (C. C. A. 8, 80 Fed. (2d) 745);

Georgian Hotel Corporation (C. C. A. 7, 82 Fed. (2d) 917).

The crux of the question is not whether creditors consent, but whether the proposed plan assures them full compensation in the absence of such consent.

Hence the efforts of corporate debtors to bring themselves within the statutory exception have proved abortive in a number of cases because of failure to conform to the compensatory requirements recognized by the courts.

In the case of *Granville and Winthrop Building Corp.* (87 Fed. (2d) 101, cer. den. *Keig v. Lloyd,* 57 S. Ct. 932, 301 U. S. 702, 81 L. Ed. 1356), the District Court approved the proposed reorganization plan, but was reversed on appeal. The major question presented involved a construction of subsection (b) (5), and the Circuit Court said:

> "The remaining question is whether the approved plan provided adequate protection for appellant's interests. We think this must be answered in the negative. The plan provided for a liquidating trust of fifteen years' duration with an additional five years to be added if thought advisable by the trust managers. Certificates of interest were to

> be issued which were to represent no interest in the property, but only an interest in the net income and proceeds. The title to the property was to be vested in a trustee subject to the direction of three trust managers appointed by the court."

To the same effect is *Texas Hotel Securities Corporation v. Waco Development Company* (87 Fed. (2d) 395):

> "In corporate reorganization proceedings wherein property mortgaged was found to be worth nearly double mortgage debt and debtor was found to be solvent, realization of value of creditors' claims was not adequately provided by scaling down past and future interest and postponing maturity of principal for seven years, and hence consent of holders of one-third of mortgage notes could not be dispensed with on ground that plan provided adequate protection for the realization of the value of their claims."

However, no case has been found disapproving a reorganization plan where shown to reasonably conform to the requirements of the subsection under consideration.

A review of appellants' authorities under this head shows the inefficacy of the respective plans submitted in those cases. (Op. Br. 28-35):

Wayne United Gas Co. v. Owen-Illinois Glass Co. et al. (4th Cir.—91 Fed. (2d) 827):

The proposed plan for reorganization was disallowed, as failing to give proper protection to first mortgage bondholders, by permitting salaries, expenses

and interest on income debentures to be paid out of income before setting aside fund for retirement of bonds, although company's assets would be depleted by operation; the reorganized company would be started with indebtedness exceeding $2,000,000.00, although the value of its entire property would not exceed $750,000.00.

It is to be noted that rejection of the proposed plan by holders of more than 92% of $1,900,000.00 first mortgage bonds was only one factor among the reasons considered by the court in disapproving the plan. The court commented on the fact that the plan involved the assumption of a greater debt than the property could support.

Murel Holding Corporation (75 Fed. (2d) 941):

This case was on appeal from an order in bankruptcy denying a motion to vacate a stay of foreclosure suit in a State court. Appellants held a mortgage on respondents' properties for $400,500.00, and defaults on the mortgage amounted to $100,000.00. The mortgaged properties were assessed at $400,000.00.

As against expected annual rentals of $59,346.00 it appeared that expenses, taxes and interest would amount to $56,707.50, leaving a surplus only of $2,638.50 per annum, which would only suffice to pay existing arrears of taxes, and leave about $3,000.00 at the end of ten years. The property had not paid its way for several years. The mortgagee was asked to release amortization payments of $9,000.00 per annum and extend the due date of the first mortgage.

In discussing the necessity for "adequate protection" of creditors under Section 77B, the court justifiably did not consider that payment ten years hence would be the equivalent of payment now.

Francisco Building Corp., Ltd. v. Battson et al. (9th Cir.—83 Fed. (2d) 93):

In this case the trial court was sustained by this Honorable Court in declining to approve a proposed plan of reorganization which was opposed by 92.24 per cent of bondholders under which new bonds aggregating $340,925.00 were to be issued, bearing a lower interest rate and reducing claims of bondholders by $312,260.12.

Security First National Bank v. Rindge Land & Navigation Co. (9th Cir.—85 Fed. (2d) 557):

> "Where bonds of debtor corporation were purchased for 40¢ on dollar, proposed payment to purchaser, under reorganization plan, of such actual consideration paid by them for bonds in case 76% of bondholders did not consent to plan, held not payment of their claims in cash in full as required by Bankruptcy Act."

There were $1,781,000.00 in bonds outstanding, which were in default as to principal, $200,000.00 owed to unsecured creditors; $70,000.00 unpaid taxes, making a total of $2,051,000.00, plus interest.

Manati Sugar Co. v. Mack (C. C. A. (2d) 1935—75 Fed. (2d) 284):

There were outstanding against the Debtor first mortgage 20-year 7½% sinking fund gold bonds ag-

gregating $5,500,900.00, of which the petitioning bondholders held bonds in the principal sum of $14,000.00.

The Petition was opposed by a committee representing other and larger bondholders. The Petition itself was defective in a number of particulars in that, inter alia, it did not show the present status of the corporate affairs, its assets, liabilities, or its equities above its first or other lien encumbrances, nor did the petition show any need or justification for a reorganization. The Debtor was without working capital, and dependent upon bank loans for its continued operations; the market price for its product, sugar, was so low as to barely cover the cost of production, and the entire sugar industry was in a disorganized condition.

In re Cosgrave (10 Fed. Supp. 672):

This case is clearly not in point. Proceedings were brought under Section 74 of the Bankruptcy Act on Petition filed 7 days after the Petitioner had acquired an equity in an apartment house for a nominal amount. Petitioner sought a compromise of the indebtedness, which was secured by trust deeds, in an amount exceeding the value thereof, in order to prevent foreclosure. The court properly held that the petition should be dismissed as not filed in good faith by one entitled to the relief sought. In its opinion the court mentioned that "a peculiar state of facts was developed" by the petitioner's testimony, in that prior to December 10th, 1934 petitioner's business was not and had not been that of an apartment house owner or managing owner; she paid $300.00 cash and gave notes for $700.00 and $1000.00, and agreed to assume

current expenses in the sum of $1800.00 as complete payment for the owner's equity. Seven days later she filed her petition claiming the right to relief under Section 74 of the Bankruptcy Act.

DEBTOR'S PETITION WAS FILED IN UTMOST GOOD FAITH, FOR SOLE PURPOSE OF SECURING JUSTIFIABLE RELIEF FROM CREDITORS' UNREASONABLE AND UNREASONING DEMANDS.

The Debtor here seeks nothing more than a temporary breathing spell within which to liquidate its entire indebtedness, and in so doing invokes the promises of leniency which the record shows were unquestionably made by Mr. White. (R. 86-87, 275.)

Assuming that this Honorable Court would go so far as to anticipate the character of a reorganization plan which it has not yet had an opportunity to study, in the situation presented by the record the consents of creditors and stockholders are not necessary, and the Debtor's assets are shown to be more than sufficient to afford adequate compensation to its creditors on the bases of either a fair physical valuation or of a valuation of his interests as made by Mr. White (supra).

The charges of concealment, confederation and conspiracy launched against Gordon and Rowson by appellants are unsupported by the record. Such charges cannot be inferred, or rest on legal conclusions. They must be established by competent evidence, and not inferred by innuendo. Efforts on the part of Debtor's

Vice-President and Secretary to save the company from being absorbed by its President, Mr. White, most assuredly cannot be viewed as a conspiracy. At the request of White and Gordon, Rowson serves gratuitously and has no personal interest in the Debtor.

As was said in *In Re South Coast Company* (D. C. Del., 18 Fed. Supp. 43):

> "If by collusion is meant cooperation, the charge is pointless. If by collusion is meant a joint effort to accomplish something other than reorganization, there is nothing in the record to sustain it."

It is questionable in any event whether charges against the Debtor's officers may properly be considered in this proceeding.

> "Charges of misconduct against officers and directors of debtor corporation could not properly be determined in reorganization proceeding."
>
> (*Brackett v. Winkle Terra Cotta,* 8th Cir., 81 Fed. (2d) 949.)

The facts presented in the remaining cases cited by appellants on the question of good faith are readily distinguished:

R. L. Witters Associates v. Ebsary Gypsum Co. (supra):

This case is cited by appellants to the effect that Section 77B of the Bankruptcy Act is not available for the purpose of simply harassing and hindering a creditor from the collection of his debts, or for mere delay.

In this case the principal points of attack against good faith of debtor's petition were that debtor had made a conveyance some six months before, which operated to hinder, delay and defraud its creditors; that it was not a going concern, and could not be made one; or that the reorganization petition was not filed in good faith to obtain the benefits of the Act, but in bad faith, for the purpose of coercing creditors to accept an unconscionable settlement. The District Court found that the petition had not been filed in good faith.

In that regard the appellate court said (at p. 749):

> "It should be retained, and question of plan of reorganization worked out in the thorough and complete way the statute provides for later steps in the proceedings."

The quotation last given precedes appellants' quotation from the same case. (p. 37 Op. Br.) The court then continues:

> "The district judge did not find in this case, under the evidence he could not have found, that it was beyond the bounds of reasonable possibility that within the time and under the processes the statute afforded, a plan might be presented under which the benefits of the statute could be properly extended to the debtor. He could not properly have done so, for the debtor had submitted no plan, and the decision of the question of time and under the state of evidence would have been premature. Apparently of the opinion that there could be no good faith unless there was a reasonable prospect for the successful rehabilitation of

the debtor as a going or continuing corporation, his findings were directed to determining that there was no prospect of doing so. In our opinion it was not necessary for the debtor to show this. It was sufficient for it to show that it was in a position to conform to and obtain the benefit of the statute for a slow, beneficial and orderly liquidation."

"Whether the arrangement was a good or bad thing for the creditors, whether it was invalid, as fraudulent, or valid, as fair, and particularly whether in the condition it was in when the petition was filed it could present and effect a plan of reorganization within the statute, were matters to be taken up and fully determined at a later stage of the proceedings. As the record stood on appellees' motion to dismiss the petition, there was no ground for finding that it was not filed in statutory good faith, and it was error to dismiss it. The order appealed from is reversed, and the cause is remanded for further proceedings not inconsistent herewith."

(Idem.)

And at p. 748 of the same case the court said:

"Appellant insists that the district judge gave too narrow a construction to the statutory words 'good faith'; that he gave them a meaning not intended by the law makers, and neither express nor implicit in the words. * * * We agree with appellant. The statute as to the corporation's eligibility to file the petition is broad and comprehensive. Under it, any corporation which could become a bankrupt * * * may file an original petition."

To same effect is the case of *In Re Central Finding Corporation* (2 C. C. A., 75 Fed. (2d) 256). In that case the court said (at p. 261):

> "It makes no difference whether the debtor has an equity of value or not, or whether his business is to continue for five years or ten years or indefinitely. The most frequent occasion for a reorganization is where only creditors' rights are to be adjusted and liquidation is to be slow enough to take advantage of market's conditions obtaining over a long period. Section 77B expressly provides for such situations as we have here, and they are proper subjects of bankruptcy legislation. To restrict the act to reorganizations where a debtor has an equity would be to deprive the section of much, if not most, of its usefulness."

First National Bank of Wilston v. Conway Road Estates Company (8th Cir.—94 Fed. (2d) 736):

This case also is readily distinguishable from the case at bar. The proceeding was before the court under Section 77B on a question of dissolving a temporary injunction restraining the foreclosure sale of land in which the Debtor claimed an equitable interest.

It appeared that the Debtor was hopelessly insolvent, had delayed for several years in attacking the validity of the mortgage given by one acquiring title on foreclosure of an earlier mortgage and during such time had recognized and acknowledged the title of the mortgagor in a deed executed by it; that the title to the land was heavily encumbered, and the Debtor had no capital with which to redeem. The court held that

under such circumstances it could not be said that an injunction against a foreclosure sale was sought in "good faith".

Tennessee Publishing Company v. American National Bank (C. C. A. 6, 81 Fed. (2d) 463; 81 L. Ed. 13):

This case is cited by appellants in support of the admittedly sound premise that a creditor should not be compelled to stand by and see the assets of a corporation depleted in a speculative enterprise, to which he has not consented, "as not within contemplation of 77B of the Bankruptcy Act".

The facts in that case were that three successive plans of reorganization had been submitted by the Debtor, whose bonds and interest aggregating $900,000.00 were in default, in addition to unsecured claims amounting to $300,000.00, with assets worth only $295,000.00. Each of the plans submitted clearly infringed the bondholders' constitutional rights. The Debtor proposed to scale down outstanding bonds to 80% of their face value, and that the court should fix a reasonable rate of interest instead of the agreed rate.

Wayne United Gas Co. v. Owen-Illinois Glass Co. et al. (supra):

The trial court rejected debtor's proposed reorganization plan as not filed in good faith and not presenting a feasible plan within the meaning of the Act.

The first mortgage indebtedness amounted to $1,900,000.00; the total value of all of the debtor's prop-

erty was not sufficient to discharge the indebtedness, which was past due and on which default had been entered foreclosing the mortgage lien; there was no immediate prospect of enhancement in value of the property, and the prospect of earning from other sources was too remote to afford protection to the first mortgage bondholders.

Provident Mut. Life Insce. Co. v. University Ev. L. Church (9th Cir. 1937—90 Fed. (2d) 992, 995):

In this case, which involved a proposed reorganization of a church, obligations exceeding $10,000.00 were to be satisfied out of income from uncertain sources, estimated at little more than $6000.00; the mortgagee's interest rate was to be cut from 6½% to 2% and payment on principal postponed for over 25 years, with the Debtor remaining in possession of the property, unsecured creditors to be paid in full, and second mortgagees paid in part.

Platt v. Schmitt (C. C. A. 8th Cir. 1937—87 Fed. (2d) 437):

We unqualifiedly agree with the court's definition of "good faith", and also with our opponent's statement that although the many cases cited by the court in *Platt v. Schmitt* disclose an apparent reluctance to confine the scope of the term within definite limitations, there must be at least honesty of purpose, motive and intent in commencing a proceeding under said Section. All of these essentials are present in the case at bar.

Although the statute requires that the Judge must be satisfied that the petition is filed in good faith be-

fore giving his approval, what constitutes "good faith" is not defined in the Act. The authorities indicate that each case must be measured by its own peculiar facts, no one of which can ordinarily be given paramount weight.

See:

In Re Knickerbocker Hotel Co., 81 Fed. (2d) 98;

Detroit Trust Co. v. Campbell River Timber Co., 98 Fed. (2d) 389;

Snyder v. Fenner (3 C. C. A.), 101 Fed. (2d) 736;

In Re South Coast Company (supra);

In Re Loeb Apts. (C. C. A. Ill.), 89 Fed. (2d) 461;

O'Connor et al. v. Mills et al. (supra);

1 *Gerdes on Corporate Reorganizations,* Sec. 232, p. 499, Sec. 232, pp. 502-503;

7 *Remington,* 1938 Supp. 162, 163.

The Act does not require that debtor answer or otherwise plead to the Intervenors' allegations, nor has the Act been so construed.

In *In Re Grigsby Grunow Co.* (C. C. A. 7, 77 Fed. (2d) 200) the court said:

> "It was not necessary that formal pleadings be filed by opposing counsel in order for the court to determine whether the complaint was in proper form and was filed in good faith. These were facts which the court was bound to find affirmatively before proceeding further, and the fact that one creditor, instead of three, orally moved the court to dismiss appellants' petition would

not relieve the court from performing that duty." "In a summary proceeding the merits of the controversy are determined without the formality in respect of pleadings which is required in actions at law or suits in equity."

(*Continental Ill. National Bank & Trust Co. v. Chicago R. I. & P. Ry. Co.,* 79 L. Ed. 1110.)

APPELLANTS ARE NOT CREDITORS WHO WILL BE AFFECTED BY THE REORGANIZATION.

Although appellants are unsecured creditors, the Debtor does not propose to reduce the amount of their claims, nor the interest rate, nor to do anything more than to extend the due dates of the promissory notes. Hence we say that appellants are not materially affected, and should not be heard to question the good faith of Debtor's Petition, or to voice objections to a reorganization at least until such time as a plan shall have been submitted. Appellants' objections are premature, and should be deferred until by orderly process the Debtor's plan shall have been submitted for confirmation.

This has been required where the interests of secured creditors were materially affected, and such secured creditors have been compelled in proper case to await the outcome of the Debtor's proposed reorganization plan.

"Where proposed plan for reorganization of corporate debtor did not disturb bondholder's security, and value of security was greater than amount of indebtedness secured, bondholder held

not creditor whose interests were materially affected by proposed plan within Bankruptcy Act, 77B (10)."

(*Central State Life Insce. Co. v. Koplar,* 85 Fed. (2d) 181.)

"Clause (10) of subdivision (b) of amendatory Sec. 77B declares that 'affected by' the plan means 'materially and adversely' affected thereby, which is simply declaratory of the law as it would be applied anyway."

(7 *Remington,* 1938 Supp., p. 183.)

Under Section 207(b) no creditor or stockholder shall be deemed to be affected by any plan of reorganization unless the same shall affect his interests materially and adversely, and that a reorganization plan may be proposed by stockholders holding 10% of the stock, or by the debtor itself.

PAROL EVIDENCE VARYING TERMS OF WRITTEN CONTRACT.

Gordon testified that in the course of the discussion on the promissory notes to be executed to White for his advances, White told him that the two-and-one-half year notes could be extended if necessary (R. 86), and later in July, 1937, White insisted that Gordon take a vacation and seek medical aid, and that he, White, would trust him on the notes, and to forget about them. (R. 86, 87.) While it is ordinarily true that verbal agreements made at or before the time of the execution of a contract are to be con-

sidered as merged in the written instrument, there are definite exceptions to the rule.

> "In determining whether the parties intended a writing to be an integration of the entire transaction, the subject matter and surrounding circumstances may, and should, be taken into consideration."
>
> (12 *Amer. Jur.,* Sec. 232, p. 756.)

> "Conversations occurring during the negotiation of a loan or other transaction, as well as the instrument given or received, being part of the res gestae, may be considered to show the nature of the transaction and the parties for whose benefit it was made, where the fact is material."
>
> (*National Bank v. Kennedy,* 17 Wall. 19, 21 L. Ed. 554.)

> "Although as a general rule prior negotiations are merged in the terms of a written contract between the parties, in a proper case previous and contemporary transactions and facts may be taken into consideration, not for the purpose of making a contract for the parties, but to understand what contract was made."
>
> (*U. S. v. Bethlehem Steel Co.,* 205 U. S. 105, 51 L. Ed. 731.)

A court of bankruptcy, being a court of equity, looks through the form to the substance of the transaction.

It is conclusively shown by the record that White's memory was considerably below par in relation to what transpired at the time the proposed corporate

loans were discussed. White insisted that his attorney, Mr. Little, was present and participated in the conversations, and that he and Mr. Little discussed the matter at the Riverside Hotel in Reno when Rowson was not present. (R. 268 et seq.) Subsequently, however, counsel for White made a statement correcting White's testimony and admitted that Mr. Little was not present and took no part in the discussions as to the maturity dates of the notice in question. (R. 280-281.)

Then again, White testified that he had no discussion with Mrs. Gordon relative to the extension of the notes and did not remember that the notes ever came up in any conversation with her. (R. 269-270.) It was stipulated that it would not be necessary to call Mrs. Gordon in rebuttal, and that if she were present she would have testified that she stated to White that Gordon was worried about the impendency of the notes, and that White told her to tell Gordon not to worry about the notes. (R. 275.) Inasmuch as White's recollection of the initial note transaction is admittedly faulty, it is reasonable to assume that the stipulated testimony of Mrs. Gordon as to White's subsequent expressions of assured leniency also recites the facts.

COURT'S DISCRETIONARY POWER ON PETITION FOR RELIEF.

The discretionary power of the trial court will not be disturbed upon appeal, except where a clear abuse is shown.

> "The findings of district court with respect to debtor's good faith in filing petition for reor-

ganization, the feasibility of reorganization plan proposed, and unfairness of such plan, are findings of a fact, which Circuit Court of Appeals will not disturb unless clearly wrong. (Bankruptcy Act, Sec. 77B as amended, U. S. C. A., Sec. 207.)"

(*Wayne United Gas Co. v. Glass Co. et al.,* supra.)

"District Court's findings on question whether reorganization proceeding was instituted in good faith is reviewable on appeal, but will not be set aside unless clearly shown to be erroneous."

(*O'Connor v. Mills,* supra.)

Courts have consistently refused to disturb the findings of the trial court unless clearly wrong, including *inter alia:*

Central State Life Insce. Co. v. Koplar Co. (C. C. A. 8, 85 Fed. (2d) 181);

Johnson v. Johnson (C. C. A. 4, 63 Fed. (2d) 24);

Henderson Co. v. Wilkins (C. C. A. 4, 43 Fed. (2d) 670);

Wingert v. President, Directors and Co. of Hagerstown Bank (C. C. A. 4, 41 Fed. (2d) 660.)

COURT SHOULD CONSIDER FACTS DEHORS THE RECORD UNDER THE EQUITABLE CONCEPTS OF SECTION 77B OF THE ACT.

"In considering an application for extension of time the court is not confined to record facts: he may take cognizance of facts known to him

relative to the industry and general conditions, and even those learned from talks with officers of the debtor and others conversant with the industry.

Extension granted, on showing of profitable operation and reasonable expectation of satisfactory plan. In re Oval Wood Dish Corp., 16 Fed. Supp. 656."

(7 *Remington,* 1938 Supp., p. 258.)

In *Oval Wood Dish Corporation,* cited in the text supra, the objectors as secured creditors relied on *Tennessee Publishing Company v. American National Bank et al.* (supra) to support their contention that the debtor had made no showing of "reasonable expectations" for successful reorganization, and that it would be an abuse of discretion to grant an extension for that purpose. In overruling the objections the court said:

"In matters such as these, the court in exercising its discretion hardly ever depends solely upon the facts contained in the record. These are usually supplemented by the court's knowledge of the industry, the future outlook of the business, a study of the financial statement of the corporation, information obtained from talks had with officers of debtor and other persons conversant with the industry, etc."

It is a matter of every day practice for additional testimony to be taken on both sides in the Appellate Court in admiralty causes, and such testimony may, and frequently does, entirely change the case as it stood before the District Court. This Honorable

Court has such a provision in Admiralty Rule 6, but unfortunately no such rule obtains in bankruptcy practice, and certiorari for diminution of the record will not avail here.

Were this a case in admiralty, with an applicable rule permitting the submission of new evidence on appeal, Debtor's record would not be confined to conditions as they existed a year ago and which no longer reflect the actual facts. While we find no authority directly to the point that in construing the provisions of Section 77B of the Act, the Appellate Court may consider subsequent records, papers and files of the trial court, or evidence *dehors* the record on appeal, proper regard for the expressed purpose of the Act would indicate either that a certain amount of liberality in that regard is justified, or that a rule similar to this court's Admiralty Rule 6 for the bringing in of new evidence is an essential element to the constructive administration of the Act.

Irrespective, however, of such possibly extraneous considerations, the trial court's judgment is amply supported by the record, and should be affirmed.

Dated, Reno, Nevada,
May 12, 1939.

Respectfully submitted,

WALTER ROWSON,
Attorney for Appellee.